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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LORI L. OSTROSKY, JULIANNE OSTROSKY, and HAROLD C. OSTROSKY,

Appellants

vs.

STATE OF ALASKA,

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does the State of Alaska's establishment in certain families of perpetual and exclusive commercial fishing rights to publicly owned salmon violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

This is an appeal from the Opinion of the Supreme Court of the State of Alaska announced July 19, 1983. The Alaska decision upheld the State of Alaska's "limited entry" fishing law which gives fortuitously selected persons and their heirs in perpetuity exclusive commercial access to salmon in the significant fisheries of Alaska. The only method by which a non-chosen person may gain access to such commonly held fish is through inheritance or purchase from an existing permit holder who is willing to sell. Although the initial issuance fee was negligible, permits in the fishery in question now sell for approximately $100,000. Appendix I, fn. 8.

This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of this appeal and a substantial question concerning the denial of the equal protection of the law is presented meriting plenary consideration.

OPINION BELOW

The Opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

Notice of appeal and this Jurisdictional Statement were filed within ninety days of the Opinion date, Appendix II. This Court's jurisdiction is invoked under 28 USC 1257 (2). The Supreme Court of Alaska specifically ruled that the complained of restrictions of the Limited Entry Act, Alaska Statutes 16.43,010-380, do not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, Appendix I, p. 2a, 3a, 19a.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In 1973 the Alaska Legislature adopted Chapter 43 of Title 16 of the Alaska Statutes known as the Limited Entry Act. The Act specifies that after January 1, 1974 "no person may operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim use permit issued by the commission." A.S. 16.43.140. Only persons who previously had taken fish commercially as holders of gear licenses were eligible for entry permits. Although described as a "use privilege", A.S. 16.43.150 (3), after initial issuance the permit became a functional property right. The permits can be both inherited and sold:

A.S. 16.43.170(b) provides in pertinent part:

> [T]he holder of an entry permit may transfer his permit to another person or to the [Commercial Fisheries Entry Commission] upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer his permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.

A.S. 16.43.150(h) provides:

> Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of his estate.

The permits are immune from attachment and execution. A.S. 16.43.150(g)(3).

The phenomena of transfer by inheritance and sale of the rights to the publicly owned fishery resource is referred to as

"free transferability."

Relevant portions of the Limited Entry Act are contained in Appendix III.

The Fourteenth Amendment to the Constitution of the United States provides:

> §1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Alaska residents Hank Ostrosky and his two daughters, Lori and Julianne, were convicted of the crime of commercially fishing salmon in the Bristol Bay of Alaska without being a holder of a limited entry permit. A.S. 16.43.360. Appendix I, p. 3a, 4a.[1]

The trial court granted post conviction relief to the Ostroskys, ruling that the Limited Entry Act was unconstitutional. Upon the State's appeal, the Ostroskys asserted *inter alia* that the Limited Entry Act denied them the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States. A majority of the Supreme Court of Alaska ruled otherwise. Appendix I.

The Ostroskys seek in this appeal to gain the opportunity for access to the natural resource of salmon which is reserved to the people for their common use. They wish only to be treated equally. They were not born into a family which has

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[1]If probable jurisdiction is noted Harold Ostrosky may be represented by separate counsel.

been bestowed a limited entry permit, nor do they have the $100,000 necessary to buy a permit. The State of Alaska has created by its Limited Entry Act exclusive rights and special privileges in certain select families by giving these families perpetual rights in a publicly owned resource to the exclusion of all others forever. Alaska has thereby created an aristocracy of fishing families repugnant to the historical and fundamental egalitarian beliefs of the United States.

The majority of the Alaska Supreme Court stated:

> An entry permit is a government license having value issued to a limited number of people. As such it resembles a liquor license, or a permit to operate a trucking firm over a given route, or a utility franchise, or a broadcast license. While these privileges are both purchasable and inheritable, the fact that the poor cannot buy them is wealth discrimination only in the general sense that all prices discriminate in a society where wealth is distributed unequally. Further, that the poor seldom inherit such privileges is lineage discrimination only in the sense that laws permitting inheritance of anything of value are discriminatory . . . Since the wealth and lineage classifications presented here are not different from those which pervade our system of private property, we do not place the interest asserted by the Ostroskys—redistribution of entry permits based on a system free of these classifications—in an elevated position on the *Erickson* sliding scale. *It follows, of course, that the rational basis test is the appropriate standard for this federal constitutional claim.* Appendix I, p. 19a. (Emphasis supplied.)

The Ostroskys assert that naturally occurring fish are a public resource held in common for all, and as such are intrinsically distinguishable from alcohol or a utility franchise.

Indeed, former Chief Justice Rabinowitz in his dissent succinctly stated:

> I would hold that the state bears a high burden of showing the substantiality of its interests throughout our equal protection examination. Thus, I specifically

> disagree with the majority's conclusion that "[t]he individual interest asserted in appellants' challenge to the transferability provisions of the Act is not of high order."
>
> * * * * *
>
> The initial "grantees" [recipients of the limited entry permits] enjoy the ability to sell, assign, or pass on to their heirs their share of the gear fishery resource . . . Most importantly, the holder's right to the license never expires; the holder's heirs may hold it forever. Alternatively, they may sell it and realize a return based upon its value as an asset held in perpetuity. Under the free transferability system, none of the value of the resource is retained or ever returns to the State and the people.
>
> * * * * *
>
> Initial grantees were presented with a windfall at the expense of all other persons in the state. Public rights were extinguished in order to create exclusive private interests of sometimes enormous value. Under the equal protection clause the populace was divided into two categories: those who would receive this great boon from the State, and those who would forever lose their share in the resource unless they someday "bought it back" through the purchase of a gear license.

Appendix I, n. 3a, 22a, 23a. Justice Rabinowitz concluded as, it is submitted, this Court should:

> I am also in disagreement with the court's observations that the Limited Entry Act discriminates on the basis of wealth only in the manner that any price does, and I further disagree that liquor licenses and utility franchises furnish appropriate analogues. These assumptions overlook the constitutional status of the right allocated by the Limited Entry Act and the fact that here the relevant "free market" is one which was created legislatively and one which perpetuates and aggravates economic disparities.

Appendix I, p. 26a, n6.

The system by which only fortuitously selected families are given access to the publicly owned resource of fish is of a significantly high order as to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. There are two classes of people created by the Alaska Limited Entry Act: Those families who are permitted to fish for salmon and those who are not. All Alaska residents should have equal opportunity for access to a State owned and controlled resource which is held in common for all the people. Under the present scheme opportunity for access to this resource can be gained only by inheritance or by purchase. This scheme of limited entry creates a special privilege and exclusive perpetual right to fish among a limited and fortuitous class of families in direct violation of the Fourteenth Amendment to the Constitution of the United States. The present scheme of limited entry removes salmon from common use and monopolizes them to an exclusive few families forever.

THE QUESTION PRESENTED IS SUBSTANTIAL

In *Reetz v. Bozanich*, 397 U.S. 82 (1970), this Court reversed a three judge District Court panel which had held a similar Alaska limited entry scheme invalid on equal protection grounds, remanding for the purpose of allowing the State Court to first determine the State constitutional issues:

> A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship. *Ibid.* p. 86-87.

This case is the functional culmination of that remand. The highest court of the State of Alaska has now determined that such a creation of private property rights in a publicly owned fishery does not violate the Constitution of the State of Alaska or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The three judge panel in *Bozanich*, 297 F. Supp. 300 (D. Alaska 1969), described the similarly offensive regulation as establishing "monopolistic trade guilds", at 307, and its effects as follows:

> The only persons that can presently qualify for net gear licenses are those already vested with the local privilege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960. An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net gear to catch salmon. Thus, if an outsider wished to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years possessed the right to fish in the area . . . Under this scheme, entry into the salmon fishing industry is controlled not by the State, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire.

297 F. Supp. 304-305, footnotes omitted.

Under the Act at bar, a closed class consisting of the original permits as issued to the then existing fishermen and their heirs are given the power to choose who can fish and the price to be paid.

This Court has long recognized that ever since Roman times animals *ferae naturae* have been considered part of the *res nullius*, subject to control by the sovereign. Fish and game are the common property of all citizens and the government acts as trustee exercising "ownership" for the benefit of its citizens. The most extended exposition of this precept appears in the majority opinion in *Geer v. Connecticut*, 161 U.S. 519 (1896).

In *Toomer v. Witsell*, 334 U.S. 385 at 402, (1948), this Court said of fish: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to

preserve and regulate the exploitation of an important resource." The Court held that the ownership theory such as it may exist does not allow a state to exercise its power in violation of the Constitution of the United States.

In the more recent case of *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court again discussed State ownership of fish:

> In any event, '[t]o put the claim of the State upon title is' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' *Missouri v. Holland*, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. *Ibid; Geer v. Connecticut, supra*, 161 U.S. at 539-540 (Field, J. dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' *Toomer v. Witsell*, 334 U.S. 385,402 (1948); see also *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420-421 (1948). *Under modern analysis the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.* As we have demonstrated above, Virginia has failed to do so here. *Ibid.* 284 (Emphasis supplied).

See also, Kleppe v. New Mexico, 426 U.S. 529 (1976). A state's asserted control over its resources does not preclude the proper exercise of federal power. Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) citing *Douglas v. Seacoast Products, Inc.* 431 U.S. 265 (1977).

The Supreme Court of the State of Washington rejected a similar scheme in 1936 in *State v. Huse*, 59 P.2d 1101 (Wa. 1936). The court found the state owned the fish in its waters

in its proprietary capacity and held title as trustees for all people of the state for the common good. Any regulations made for the use of the common property, however, must bear equally on all persons. The provisions of the infirm Washington law forbidding issuance of license to take salmon by gill net except to those holding such licenses previously was held invalid as creating an arbitrary classification and conferring special privileges. The court noted:

> Respondent begins with the premise that one of the fundamental objects sought by the act was the conservation of the State's supply of food fish. This may be conceded. Respondent then advances, as a reason for the discrimination and classification, the fact that, at the time of the adoption of the initiative measure, it was recognized that there was a large number of people in the state whose sole means of livelihood was gill netting within the prohibited area, and that it would have been a grave injustice to deprive them of their livelihood; hence by the provisions of section 4 of the act, such persons were to be permitted to follow their accustomed vocation during the remainder of their lives, while all others were to be prohibited. The argument possesses some measure of plausibility as indicating a beneficient complaisance on the part of the sovereign state toward certain of its citizens suddenly embarrassed by the quick and decisive turn of things. But the argument, we think, is not legally sound, and its weakness is, in our opinion, demonstrable.
>
> *In the first place as already stated, the state holds title to the fish within its waters in trust for all its people and for the common good, not simply for a limited few nor for the good of a small minority. The state cannot dispose its bounty in favor of particular persons and withhold it from all others who have equal right or claim.*
>
> * * * * * *
>
> The regulation, if it may be so called, is founded upon mere fortuitous circumstances and makes a gratuitous

selection of individuals who shall enjoy the use of common property to the exclusion of all others. (Emphasis supplied.) *Ibid.* 1105.

The equal protection problems the Washington Supreme Court identified in 1936 and the situation in Alaska today are identical. Because of fortuitous circumstances those who were fishing in the past and their succeeding generations or designees are allowed to fish in the future in perpetuity.

The original issuance of limited entry permits required that the applicants be ranked according to the degree of economic dependence upon the fishery, the extent of past participation, the availability of an alternative occupation, and the investment in gear and vessel. A.S. 16.43.250. As questionable as these original issuing criteria are, any subsequent transfers by inheritance or windfall purchase bears no relationship to these stated purposes.

Three standards of review are commonly utilized in cases involving the equal protection clause of the Fourteenth Amendment to the United States Constitution. Where suspect classifications or fundamental rights are involved differential treatment will be upheld only if the purpose of enactment furthers a "compelling State interest" and the enactment itself is necessary to the achievement of the interest. Second, where classifications are based on gender or birth, the purpose of the enactment must be "important", and the means used to accomplish that purpose must be fairly and substantially related to its accomplishment. In cases not involving suspect classifications, infringement of fundamental rights, or classifications based on gender or legitimacy, differential treatment must be based on governmental interest which is legitimate and the act must be rationally related to its achievement. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Craig v. Boren*, 429 U.S. 190, 197-198 (1976); *Lalli v. Lalli*, 439 U. S. 259, 265 (1978).

The Limited Entry Act at the very least infringes on a "sensitive and fundamental personal right." The importance of the right to engage in a chosen occupation was recognized by this Court in *Toomer v. Witsell, supra; Hicklin v. Orbeck*

437 U.S. 518 (1978) and *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, (1978). The wealth and lineage based discriminations in the Limited Entry Act infringes upon the fundamental and sensitive right for an opportunity to engage in the occupation of commercial fishing as well as the right for democratic access to a publicly owned resource.

This is not a case where a statute is being attacked because it involves a rational distinction made with less than mathematical exactitude. Limited entry makes arbitrary distinctions that not only deny the equal protection of the law but bear no relationship to the stated purposes of the Act. Nor is it a statute which is attempting to implement a program step by step. This differentiates the Limited Entry Act from the economic regulations upheld in *City of New Orleans v. Dukes*, 427 U.S. 297, (1976).

New Orleans dealt with an initial allocation of the right to sell hot dogs in the *vieux carre*. Hot dogs are not a naturally occurring publicly owned resource. Even assuming comparison to the initial allocation of limited entry permits, *New Orleans* doesn't speak to the transferability of those permits. The hot dog vendors allowed to continue in business were not allowed to sell or devise that right.

The decision contemplated the normal meaning of grandfather rights as a gradual phasing out of a nonconforming use. That is not the intent of the Limited Entry Act. Fishing is meant to continue at the present level. There is no phasing out. There is only the creation of perpetual and exclusive fishing rights within certain families to the exclusion of others.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), this Court struck down a Social Security Act distinction between legitimate and illegitimate children. The Court cited *Weber V. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), for the proposition that:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate

> child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parents. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." *Id.* at 175-176.

The Alaska Limited Entry Act discriminates in a similar fashion as to status by birth. There are some persons who by accident are born into families which will have access to salmon and others born into families who will never have the opportunity for such access.

The concurrence of Justices Brennan, Marshall, Blackman, and Powell in *Zobel v. Williams*, 102 S. Ct. 2309 (1982), as expressed in footnote 2 appropriately comments:

> The American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution. See art I §9 cl. 8 ("No title of Nobility shall be granted by the United States."). See also Virginia Bill of Rights (1776), Rutland. The Birth of the Bill of Rights, App. A ("no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services").

The Alaska Limited Entry Act creates an aristocracy of fishing families who have exclusive and separate emoluments and privileges in the publicly owned resource of free-swimming salmon. Limited entry stands in direct conflict with the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

DATED this _____ day of September, 1983, at Anchorage, Alaska.

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APPENDICES

APPENDIX I

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA

Appellant,

v.

LORI L. OSTROSKY, JULIANNE OSTROSKY and HAROLD C. OSTROSKY,

Appellees.

File No. 6336

OPINION

[No. 2702-July 19, 1983]

LORI L. OSTROSKY, JULIANNE OSTROSKY,

Cross-Appellants,

v.

STATE OF ALASKA,

Cross-Appellee.

File No. 6373

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: John B. Gaguine, Assistant Attorney General; Jonathan K. Tillinghast, Assistant Attorney General; Wilson L. Condon, Attorney General, Juneau for Appellant/Cross-Appellee.

Frederick Paul, Paul, Johnson, Paul & Riley, Seattle, for Harold C. Ostrosky. Robert H. Wagstaff, Wagstaff, Middleton & Pope, Anchorage, for Lori and Julianne Ostrosky.

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

MATTHEWS, Justice.
RABINOWITZ, Justice, dissenting.

The issues presented in this case are:

(1) whether the entry restrictions of the Limited Entry Act, AS 16.43,010-.380, violate the following provisions of the Alaska Constitution:

(a) article VIII, section 3, which reserves naturally occurring fish to the people for common use;

(b) article I, section 1, which guarantees all persons equal rights and opportunities;

(2) whether the transferability provisions of the Limited Entry Act, under which entry permits can be sold or inherited, AS 16.43.150(h) and .170 violate

(a) article VIII, section 15 of the Alaska Constitution, prohibiting exclusive rights or special privileges of fishery;

(b) article VIII, section 3 of the Alaska Constitution, preserving naturally occurring fish to the people for common use;

(c) article I, section 1 of the Alaska Constitution, guaranteeing all persons equal rights and opportunities.

(d) the equal protection clause of the fourteenth amendment to the United States Constitution.

The superior court answered the questions designated above as 2 (a) and (c) in the affirmative. We answer all of them in the negative, and reverse.

I. FACTS

When Harold Ostrosky and his two daughters, Lori and Julianne, operated salmon drift net gear in Bristol Bay without entry permits they were cited for illegal possession of commercially caught fish,[1] and illegal commercial fishing.[2]

The three went to trial and were convicted. Mr. Ostrosky was fined $10,000 with $9,000 suspended, and Lori and Julianne were each fined $5,000 with $4,500 suspended. In addition, the boat on which they were fishing, the Lori K.O., was ordered forfeited to the state, with the forfeiture suspended for two years.

Lori and Julianne filed an application for post-conviction relief, claiming their convictions were invalid because the provisions of the Limited Entry Act regarding transfer of entry permits violated state and federal constitutional requirements.

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[1] 20 AAC 05.110 provides:

> PERMIT REQUIRED TO POSSESS FISH OR SHELLFISH. (a) It is unlawful for any person to possess, within water subject to the jurisdiction of the state, any fish or shellfish, taken for a commercial purpose, aboard a fishing vessel commonly used for taking that species of fish or shellfish unless the person has in his possession a valid interim-use or entry permit card allowing him to take the fish or shellfish in his possession with the gear with which the vessel is equipped unless waived by the commission for good cause.
>
> (b) As used in this section, a "commercial purpose" includes any sale, purchase, trade, gift, or any portion of a commercial transaction.

[2] 20 AAC 05.100 provides:

> PERMIT REQUIRED TO OPERATE GEAR. (a) It is unlawful for any person to operate gear, within water subject to the jurisdiction of the state, for the commercial taking of any fishery resource without a valid interim-use or entry permit card issued by the commission authorizing that person to operate that type of gear in that fishery unless waived by the commission for good cause. To be valid, an interim-use permit or entry permit card issued by the commission must be signed in the space provided by the person named as the card holders [sic].

Mr. Ostrosky joined in this position. The superior court held that the transferability provisions of the Limited Entry Act violate article VIII, section 15 of the Alaska Constitution, prohibiting exclusive rights of fishery, and article I, section 1 of the Alaska Constitution, guaranteeing all persons equal rights and opportunities.[3] The court granted post-conviction relief to the Ostroskys.

---

[3] The court's decision relating to these issues states as follows:

> The defendants' state constitutional challenge involves two related arguments: first, that the Act's inheritance and transfer provisions create in permit holders an "exclusive right . . . of fishery" in violation of Article VIII, section 15, and second, that these provisions create a wealth and familial classification in violation of the Article I, section 15 guarantee of equal treatment.
>
> Article VIII, section 15, as amended in 1972, provides:
>
> No exclusive right of fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state. This section does not restrict the power of the state to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the state.

The Act was passed under the authority of this constitutional provision. The obvious tension between the ban on "exclusive rights or privilege of fishery" on the one hand and the grant of power to "limit entry into any fishery . . . to prevent economic distress among fishermen and those dependent upon them for a livelihood . . ." on the other hand is reflected in the Act which has as its purpose limitation of entry without "unjust discrimination." AS 16.43.010(a). The elaborate ranking system for the award of initial free permits, AS 16.43.200-270, 20 AAC 05.600-670, represents the legislative accommodation of this tension. This initial allocation system has been held to be constitutional. *Apokedak, supra.*

An analysis of the Act in terms of Article VIII, section 15 is not necessary, however, since the issue is subsumed in the equal protection analysis. Article VIII, section 15 gives specific expression of the facts which go into the equal protection analysis. In State v. Erickson 574 P.2d 1 (Alaska 1978), the court adopted the single equal protection test.

> Initially, we must look to the purpose of the statute, viewing the legislation as a whole, and the circumstances surrounding it. It must be determined that this purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced

The state appealed to the court of appeals which certified the appeal as appropriate for transfer to this court pursuant to AS 22.05.015(b) and Alaska R. App. P. 408(b). We accepted the certificate.

(Footnote Continued)

> therefor, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved. 574 P.2d at 12.

Article VIII section 15 is the declaration by the people that the purpose of limiting entry into the fisheries is within the police power of the state, provided no exclusive right of fishery is created. The real question presented is whether the means by which the state limits entry bears a fair and substantial relation to the Act's purposes.

The nature of the right involved has been addressed by the court in *Apokedak* as an ". . . important right to engage in economic endeavor, which in some cases may involve the right to employment in the industry." 606 P.2d at 1266 (footnote omitted)..

The purposes of the Act identified by the Supreme Court in *Apokedak* are: (1) enhancing the economic benefit to fishermen since too many involved in the industry prevented those relying on fishing for a livelihood from securing adequate remuneration; (2) conserving the fishery; (3) avoiding unjust discrimination in the allocation of a limited number of entry permits; and (4) administrative convenience. 606 P.2d at 1255. Does allocation of entry permits by the market and inheritance bear a fair and substantial relation to these legislative purposes?

The particular means of allocating permits is irrelevant to conservation of the fishery. That purpose is accomplished by controlling the catch. The allocation system is, therefore, irrelevant to achievement of purpose.

The inheritance and transferability provisions of the Act clearly serve the purpose of promoting administrative convenience. Allowing the market and rules of descent and distribution to allocate permits avoids the necessity of a case by case ranking which was required for the initial award of permits. However, the purpose of promoting administrative convenience cannot alone outweigh the important right impinged by the statutory classification. 606 P.2d at 1266, footnote 45.

Allocation of permits by the market does not serve the purpose of avoiding unjust discrimination among those seeking permits. On the contrary, this system of allocation results in an unjust discrimination. Assuming a willing seller, the availability of permits is based solely on ability to pay. As noted by Justice Dimond in his concurring opinion in *Apokedak*:

> This situation has the effect of creating another classification: on the one hand, the person with abundant financial resources, and

II. CONSTITUTIONALITY OF ENTRY RESTRICTIONS

Although the superior court struck down the Limited Entry Act on the grounds that its transferability provisions violate the Alaska Constitution, the Ostroskys have offered additional grounds for holding the Act unconstitutional. We consider these because a judgment may be affirmed on grounds different from those relied on by the trial court. *Moore v. State*, 553 P.2d

(Footnote Continued)

> on the other, a person of considerably more modest means. It seems to me that the Act is having the effect of favoring the well-to-do over the poor. In my opinion, this discrimination is basically unfair or unjust, and does not conform to the principle in article I, section 1 of our Constitution which requires equality of treatment of persons in the state. 606 P.2d at 1268-69.

In the initial ranking an applicant was awarded points by demonstrating the economic hardship which would result from exclusion from the fishery. AS 16.43.250. As the system now operates, wealth is the sole determinative factor. The provisions to avoid unjust discrimination in the initial award of permits have been stood on their head. Clearly, the market allocation of permits bears no relation, substantial or otherwise, to the just allocation of permits.

The state analogizes the market allocation of permits to the sale of alcoholic beverage licenses and subsequent sales of homestead lands. I find neither analogy compelling. Of principal importance is the fact that the people enjoy access to the state's fisheries which does not pertain in the case of alcohol. See Article VIII, sections 3 and 15, Constitution of Alaska. Since the "right" to hold a liquor license does not occupy a privileged constitutional position, the equal protection analysis is quite different. With regard to land sales, it is true that there are some superficial similarities, since subsequent allocations are by the market and inheritance. The analogy breaks down, however, because of two important differences. First, land, as property, has some intrinsic worth; and the allocation process bears a direct relation to this intrinsic value. The limited entry permit is a license, not property, AS 16.43.150, and has no intrinsic value. The market for limited entry permits is an entirely artificial creation of the allocation process. Second, the law regarding ownership and transfer of land is the product of historical conditions antedating the creation of the United States of America. The Constitutions of the United States and Alaska recognize this historical legacy and have been interpreted with reference to it. The Act is of recent vintage and the legislature explicitly avoided endowing the permit with the attributes of a property right. AS 16.43.150(e).

It may be argued that the allocation of permits by the market is necessary to allow the permit holder to recoup his investment in vessels and gear.

8, 21 (Alaska 1976); *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961).

We will first consider Harold Ostrosky's contentions concerning the validity of the entry restrictions of the Act. Those restrictions, in general, provide that no one can be the primary operator of commercial fishing gear without an entry permit. There are only a limited number of entry permits for each particular fishery. Following the implementation of the Act in 1973, entry permits were issued to those who had previously held

(Footnote Continued)

However, market allocation bears only a tenuous relation to this purpose. First, the market price of the permit is dependent on the type of permit and the location of the fishery, and is not directly dependent on the vessel and gear owned by the transferor. Second, investment in vessels and gear is, or should be, a factor in the permit holder's decision to leave the fishery. The capital investment can be amortized over the life of the permit, the length of which is dependent on the holder. Provisions for emergency transfer of the permit mitigate any harshness due to illness or death of the holder.

Th Act has as a purpose prevention of economic distress among fishermen and their dependents. A sizable capital investment is required to engage in commercial fishing. This investment was recognized in the initial ranking of applicants for free entry permits. AS 16.43.250(a)(1). See Younker v. Alaska Commercial Fisheries Entry Commission, 598 P.2d 917 (Alaska 1979). Vessels and gear unaccompanied by a permit to operate them are of relatively little value. The state limitation on entry to the fishery, also limited the market for vessels and gear. The Act recognizes the tie between permits and capital in AS 16.43.170(c) and AS 16.43.310-.320 under the buy-back programs both the permits and vessels and gear are purchased by the state.

Applying the *Erickson* test and considering the goal to be obtained, protection of the investment, and the means selected, allocation by the market, and in light of the important right impinged, I find the Act does not bear a fair and substantial relation to the statutory purposes. I further find that the inheritance and transferability provisions of the Act have the effect of causing, rather than avoiding, unjust discrimination, among those seeking permits. I find the Act unconstitutional under Article I, section 15 of the Alaska Constitution, and hold that the defendants cannot be penalized for failure to possess the required permits, therefore necessitating a reversal of their convictions.

Ostrosky v. State No. 3 AN-80-7652 Criminal (Alaska Super., August 14, 1981) (footnote omitted).

gear licenses on a grandfather rights basis subject to detailed statutory and regulatory guidelines. *See generally Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255 (Alaska 1980). Commercial fishermen who had been crew members but not gear license holders were not eligible to receive entry permits in the initial allocation. AS 16.43.260(a). Under the Act, crew members need not have an entry permit as long as the holder of the entry permit is present when gear is operated. AS 16.43.140(b).

A. *Article VIII, Section 3.*

Article VIII, section 3 of the Alaska Constitution provides:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Until it was amended in 1972, article VIII, section 15 provided:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

In 1972 an additional sentence was added to section 15:

> This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Harold Ostrosky argues (a) that section 3 of article VIII prohibits entry limitations and (b) that the prohibition of section 3 has not been affected by the 1972 amendment to section 15. The first part of this argument is supported by judicial authority. In *Bozanich v. Reetz*, 297 F. Supp. 300, 306 (D. Alaska 1969), a three judge federal court held that a precursor of the present limited entry system, chapter 186, SLA 1968, was unconstitutional under both section 3 and section 15 of article VIII. This decision was vacated by the United States Supreme Court on abstention grounds, *Reetz v. Bozanich*, 397 U.S. 82, 25 L.Ed.2d 68 (1970). The parties then litigated the same question in state superior court, which held that section

3 and section 15 of article VIII, as well as section 1 of article I, prohibit limited entry.[4]

Like the courts in the *Bozanich* cases, we have difficulty squaring the section 3 reservation of fish to the people for common use with a system which grants an exclusive right to fish to a select few who may continue to exercise that right season after season. We accept, therefore, at least for the purposes of this case, the proposition that limited entry is inconsistent with the command of article VIII, section 3.

We proceed to an examination of the second part of Harold Ostrosky's argument, namely that the amendment to article VIII, section 15 did not eliminate the prohibition on limited entry implicit in article VIII, section 3. This argument is textually correct, for the language of the amendment only refers to section 15. However, the conclusion is inescapable that the purpose of the amendment was to authorize, so far as the state constitution is concerned, a limited entry system. No other purpose seems reasonably possible.

Our conclusion is supported by the history of the 1972 amendment. As introduced by the Governor and as passed by the Senate, the language of the proposed amendment was stated in the affirmative: "The state may restrict entry to any fishery . . ."[5] As so written, there would be no question but that limited entry would be constitutional as a matter of state constitutional law, despite any contrary provisions of the state constitution. The House Resources Committee changed the language to its present negative form. The Committee report explaining this action makes it clear, however, that the Committee did not intend to constrict in any way the sweep of the amendment. Thus, the report states with approval the purpose of the amendment: to "give the state the power to restrict entry into a fishery for certain public purposes." The report continues:

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[4] *Bozanich v. Norenberg*, No. 70-389 Civil (Alaska Super., 1st Dist., Juneau, March 8, 1971) per Judge Carlson.

[5] 1971 Senate Joint Resolution No. 10.

> In his testimony to the committee the Attorney General, Mr. Havelock, suggested that an amendment of this nature is essential if Alaska is to ever have an economically healthy fishing industry. For more than a decade fisheries economists have been calling for such an institutional change, and over the past few years the fishermen themselves have come to recognize that this amendment, though no panacea, is an essential first step to revitalization of the fishing industry in Alaska.

After so endorsing limited entry the report proceeded to explain the Committee's substituted language:

> After carefully studying the new language proposed in the Senate Resolution, your committee has adopted a substitute which alters the wording of the amendment in three small but signficant ways.

Only the first change concerns the change from a positive to a negative form of expression. The report continues:

> In the case of *Reetz v. Bozanich,* the U.S. Supreme Court held that a statute limiting entry into a fishery creates an exclusive right of fishery. As a consequence,the meaning of the new language, which the Senate proposes to add as a second sentence in Section 15, is not as clear as it could be. In order to eliminate any confusion or ambiguity we have altered this new language to show that the state's power to limit entry is a specific exception to the "exclusive right" prohibition.

2 House Journal 760-61 (1971).

Thus, the purpose of the House Committee in altering the affirmative language of the Senate Joint Resolution to the negative form which found its way into the amendment was to clarify perceived ambiguities, not to restrict the meaning of the Senate Joint Resolution.

We conclude that the purpose of the amendment to article VIII, section 15 was to grant the state the power to impose a limited entry system in any fishery, notwithstanding any state constitutional provisions otherwise prohibiting such

a system. Therefore, Harold Ostrosky's argument that the entry provisions of the Act violate article VIII, section 3 of the Alaska Constitution must fail.

B. *Article I, Section 1.*

Article I, section 1 of the Alaska Constitution states the principle that "all persons are equal and entitled to equal rights, opportunities, and protection under the law . . ." Harold Ostrosky's argument that the entry restrictions of the Act violate this clause is similar to his argument relating to article VIII, section 3. He argues that the superior court in the second *Bozanich* case held that the 1968 precursor to the present Act violated article I, section 1, that this conclusion was correct, and that article I, section 1 was not amended by implication by the 1972 amendment to article VIII, section 15. For the reasons we have expressed above with respect to the argument concerning article VIII, section 3, this argument is rejected. The authority to impose some limited entry system became in 1972 a part of Alaska's constitution. The amendment granting that authority cannot, in turn, be challenged as unconstitutional under preexisting clauses in the same document.[6]

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[6] Harold Ostrosky raises two other points. (1) He argues that even if a limited entry program is constitutionally permissible, the current act does not further the purposes expressed in the amendment to article VIII, section 15 and is therefore invalid. However, the role of the judiciary is not to invalidate acts of the legislature because in retrospect the acts have arguably failed to achieve the purposes for which they were enacted. Rather our role is to examine whether the legislature could reasonably have expected that the Limited Entry Act would advance the purposes of article VIII, section 15. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 66 L.Ed. 2d 659, 668-69, reh'g denied, 450 U.S. 1027, 68 L.Ed. 2d 222 (1981); Vance v. Bradley, 440 U.S. 93, 111-12, 59 L.Ed 2d 171, 184-85 (1979). No argument has been made that this test is not satisfied, nor do we believe that any such argument would be reasonable. As we stated in Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1263 (Alaska 1980):

> The overall economic and conservation goals of the Act [which are the same as the constitutional goals] are met by limiting the number of permits.

III. CONSTITUTIONALITY OF TRANSFERABILITY PROVISIONS

AS 16.43.170(b) provides in pertinent part:

> [T]he holder of an entry permit may transfer his permit to another person or to the [Commercial Fisheries Entry Commission] upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer his permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.[7]

AS 16.43.150(h) provides:

> Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of his estate.

Lori and Julianne Ostrosky do not attack the entry restriction aspect of limited entry. Instead, they contend the above transferability provisions are unconstitutional. Their argument is that these provisions exclude those who do not have sufficient assets to purchase an entry permit and who have not inherited one. This, they contend, amounts to an unintentional

(Footnote Continued)

(2) He argues that the Limited Entry Act is a burden on interstate commerce in violation of the commerce clause of the Unted States Constitution. The argument is so cursory that it is incomprehensible to us. Accordingly, we do not consider it. *See* State v. O'Neill Investigations, Inc., 609 P.2d 520, 528 (Alaska 1980); Lewis v. State, 469 P.2d 689, 691 n.2 (Alaska 1970); Pedersen v. State, 420 P.2d 327, 330 nn.4-5 (Alaska 1966).

[7] The present ability requirement is not a stringent one. It requires only that "the person is physically able to harvest fish in the fishery and has reasonable access to commercial fishing gear of the type utilized in that fishery." 20 AAC 05.770(5).

classification based on wealth and lineage. They also argue that the transferability provisions themselves create an exclusive right or special privilege of fishery barred by the first sentence of article VIII, section 15 and by the common use clause, article VIII, section 3. They suggest that a transfer system meeting the requirements of the constitution would be one in which a permit would revert to the state when the permit holder dies or is no longer using it. Reissuance could be accomplished either under a type of apprenticeship system, emphasizing past participation in commercial fishing as a crewmember, or a lottery, or a combination of both. For convenience we will refer to the existing system as "free transferability" and to the type of system proposed by Lori and Julianne Ostrosky as a "reversion/reissuance system."

A. *Article VIII, Sections 3 and 15—The Least Exclusive Alternative Contention.*

One interesting argument made by Lori and Julianne Ostrosky is based on the tension between article VIII, section 3 and the first sentence of article VIII, section 15 on the one hand, and the amendment to section 15 on the other. This argument concedes that some limited entry system is constitutionally permissible because of the amendment. However, since the common use clause of section 3 and the no exclusive right of fishery clause of section 15 remain in the constitution, the premise of the argument is that whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause. The argument concludes that free transferability does not entail the least possible impingement on the anti-exclusionist values which these provisions reflect.

Since "[i]t is a well accepted principle of judicial construction that, whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized," *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974), the premise of this argument is logical. However, the conclusion that free transferability is more exclusive than a reversion/reissuance system has not been demonstrated.

Given a finite number of permits for each of the several fisheries subject to the Act, it is not evident that free transferability constitutes a greater impingement on the nonexclusive, common use goals of article VIII than a system of reversion and reissuance. In a system of free transferability there will be those who are unable to afford a permit.[8] However, in a reversion and reissuance system where reissuance is by lottery there will be those who are excluded by chance. Similarly, if reissuance is based on an apprenticeship system there will be those who are excluded because, while they may be fit enough to fish, they are not hired by existing permit holders as crew members because stronger and younger help is available, or for other reasons. Exclusion from participation as a gear license holder in a fishery is not more violative of the common use or the no exclusive right of fishery clauses because it is based on one's financial rather than physical standing, or on the laws of chance.[9] We thus reject the Ostroskys' contentions that free transferability violates article VIII, sections 3 and 15.

B. *Equal Protection*

Three standards of review are commonly utilized in cases involving the equal protection clause of the fourteenth amendment to the United States Constitution. First, where suspect classifications (i.e., those based on race, national origin, or alienage) or fundamental rights (e.g., voting, litigating, or the

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[8] For the last quarter of 1981 the average price for a permit was approximately $50,000. For some fisheries average prices were much higher, ranging upwards to $100,000. Commercial Fisheries Entry Commission, 1981 Quarterly Permit Price Information (1982). Permits are, however, often transferred. In each of the years 1980 and 1981 about 1,000 or 10% of the existing permits, were transferred, primarily by sale. Commercial Fisheries Entry Commission, Commercial Fisheries Entry Permit Transfers, 1980 and 1981 (1982).

[9] The system of termination of permits after a specified term of years during which the holder "may be expected to recoup his investment in gear and vessel and realize a reasonable return," suggested by the dissent entails permit reissuance, probably on the basis of a lottery. The reissuance aspect of such a system, if based on a lottery, would be subject to the comments which we have made above. Likewise, if reissuance were based on

exercise of intimate personal choices)[10] are involved, differential treatment will be upheld only when the purpose of the enactment furthers a "compelling state interest" and the enactment itself is "necessary" to the achievement of that interest. This is often called the strict scrutiny standard.[11] Second, where classifications are based on gender or illegitimacy, the purpose of the enactment must be "important," and the means used to accomplish that purpose must be "fairly and substantially" related to its accomplishment. *Craig v. Boren*, 429 U.S. 190, 197-98, 50 L.Ed. 2d 397, 407 (1976), *reh'g denied*, 429 U.S. 1124, 51 L.Ed. 2d 574 (1977); *see also Lalli v. Lalli*, 439 U.S. 259, 265, 58 L.Ed. 2d 503, 509 (1978). This is regarded as an intermediate level of review. Third, in cases not involving suspect classifications, the infringement of fundamental rights, or classifications based on gender or illegitimacy, differential treatment must be based on a governmental interest which is "legitimate," and the enactment must be "rationally" related to its achievement.[12] In our discussion of federal equal protection we have called this the rational basis test. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

(Footnote Continued)

a type of apprenticeship system, our comments above would also be applicable. Additionally, such a system would be of questionable feasibility. For most fishermen commercial fishing is a career choice. It would work an obvious hardship on a gear license holder whose permit expired after, for example, ten years, to then force him out of his chosen career. This would be similar to restricting a license to practice law or medicine to a limited period after which the practitioner would have to make way for others and embark upon a second carer. Further, the system suggested by the dissent would tend to lock a fisherman into owning only one vessel during his fishing career. It would be difficult for a fisherman having only three or four years left on his license to finance the acquisition of a new vessel. Moreover, the fixed termination aspect of such a system would tend to foster exploitation, rather than conservation, of the fisheries.

[10] L. Tribe, American Constitutional Law § 16.7 (1978).

[11] *See, e.g.*, Kramer v. Union Free School District, No. 15, 395 U.S. 621, 626-27, 23 L.Ed 2d 583, 589 (1969).

[12] Harris v. McRae, 448 U.S. 297, 324, 65 L.Ed 2d 784, 809 *reh'g denied*, 448 U.S. 917, 65 L.Ed. 2d 1180 (1980).

The approach we have taken under the state equal protection clause is somewhat different. In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to a strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.[13] As legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale. Likewise, laws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized. This approach was first announced in *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978), where we stated:

> In applying the Alaska Constitution, however, there is no reason why we cannot use a single test. Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a "compelling state interest"; but, by avoiding outright categorization of fundamental and

[13] The flexible scale we use resembles the "spectrum of standards" of which Justices Marshall and White have written with respect to federal equal protection. San Antonio Independent School District v. Rodriguez 411 U.S. 1 98-99, 36 L.Ed. 2d 16, 81 (Marshall, J., dissenting) *reh'g denied*, 411 U.S. 959, 36 L.Ed. 2d 418 (1973); Vlandis v. Kline, 412 U.S. 441, 458-59, 37 L.Ed. 2d 63, 75 (1973) (White, J., concurring). As Justice White has put it: "[I]t must now be obvious, or has been all along, that, as the Court's assesment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance or hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discrimination." *Id.*

> nonfundamental rights, a more flexible, less result-oriented analysis may be made.

(Footnote omitted).

Having selected a standard of review on the *Erickson* sliding scale, we then apply it to the challenged legislation. This is done by scrutinizing the importance of the governmental interests which it is asserted that the legislation is designed to serve and the closeness of the means-to-ends fit between the legislation and those interests. As the level of scrutiny selected is higher on the *Erickson* scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or under inclusiveness in the means-to-ends fit will be tolerated. *Compare Vogler v. Miller,* 660 P.2d 1192 (Alaska 1983) *with Rose v. Commercial Fisheries Entry Commission,* 647 P.2d 154 (Alaska 1982). As a minimum, we require that the legislation be based on a legitimate public purpose and that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation be based on a legitimate public purpose and that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . ." *Isakson v. Rickey,* 550 P.2d at 362 (quoting *State v. Wylie,* 516 P.2d 142, 145 (Alaska 1973)).

The individual interest asserted in Ostroskys' challenge to the transferability provisions of the Act is not of a high

[14] Other language in *Erickson* suggests that a balancing of the individual rights asserted against the state's objective is to take place as a process separate from the identification and application of the appropriate standard of review. *Id.* at 12. Such a process is neither useful nor necessary because the selection of the standard of review on the sliding scale reflects an assessment of the importance of the individual rights, and the standard when selected posits the degree of importance which the government objective must have and the required closeness of fit between the means used to achieve that objective and its achievement. Thus, balancing is inherent in the process of selection and application of the standard of review and is not itself a separate step.

order. The interest is that of obtaining the right to fish as a gear license holder by lottery or apprenticeship rather than by purchase or inheritance. The system advocated by the Ostroskys would exclude on the basis of one's ability to be hired as a crewman, a matter on which age and strength are often determinative factors, or on the basis of pure chance, while the present system exclude those who are unable to afford a permit and those who do not inherit one.

While the current system may thus discriminate on the basis of wealth, it does so only in the manner that any price does. As Professor Tribe has observed: "Judicial intervention to redress poverty on the basis of equal protection is therefore in constant danger of becoming either wholesale or unprincipled . . ."[15] This may be the reason why cases striking down fees for government supplied services or privileges as discriminating against the poor have been limited to instances where fundamental rights such as access to the courts,[16] and ballots[17] have been burdened.

An entry permit is a government license having value issued to a limited number of people. As such it resembles a liquor license, or a permit to operate a trucking firm over a given route, or a utility franchise, or a broadcast license. While these privileges are both purchasable and inheritable, the fact that the poor cannot buy them is wealth discrimination only in the general sense that all prices discriminate in a society where wealth is distributed unequally. Further, the fact that the poor seldom inherit such privileges is lineage discrimination only in the sense that laws permitting inheritance of anything of value are discriminatory. Since the wealth and lineage classifications presented here are not different from those which pervade our system of private property, we do not place the interest asserted by the Ostroskys—redistribution of entry permits based on a system free of these classifications—in an elevated position on the *Erickson* sliding

[15] L. Tribe, American Constitutional Law § 16-42 (1978).

[16] Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891 (1956).

[17] Bullock v. Carter, 405 U.S. 134, 31 L.Ed. 2d 92 (1972).

scale. It follows, of course that the rational basis test is the appropriate standard for this federal constitutional claim.

The state argues that free transferability serves the following objectives:

> —By making permits inheritable and transferable among family members, the Act ensures that a fishing family will be able to continue to fish if the permit holder dies or is disabled, thus protecting the family's source of income and its investment in vessel and gear. This prevents economic distress among fishermen and those dependent upon them for a livelihood.
>
> —By making it possible for a person who has fished one permit to purchase a different one, the Act allows fishermen to move to more profitable gear types, from hand troll to purse seine, for instance) and to fish a different area when their usual area has bad runs. This prevents economic distress among fishermen, and retains the traditional mobility . . .
>
> —By making permits salable, the Act creates a market for them. Price depends largely on the state of the fishery . . . Thus, in order to keep the fisheries healthy, fishermen will obey conservation laws, assist in the apprehension of violators of those laws and willingly contribute to aquaculture programs.
>
> —By giving permit holders an incentive—money—to transfer their permits, the Act prevents the creation of a closed class of fishermen . . . [T]he number of transfers to date has been very large.
>
> —By making the acquisition of a permit certain by payment of the purchase price, the Act allows fishermen to plan where they will fish, what type of gear they will use and what investments in vessels and gear they can prudently make.
>
> —By not setting up any complex eligibility formulas for new entrants, the Act makes the transfer system readily understandable to those it will affect.

> —By not requiring the Commission to get involved in transfers to an extent beyond the simple processing of transfer applications and the certification that the proposed transferee has the present ability to fish, the Act eases the Commission's administrative burden, and allows it to focus its attention on other necessary duties, such as the setting of optimum numbers for limited fisheries and the decision whether presently open fisheries should be limited.

Free transferability, in other words, is meant to prevent hardship when a permit holder dies or becomes disabled; allow gear license holder to move from one fishery or type of gear to another; advance the causes of conservation, aquaculture, and adherence to fish and game laws by giving gear license holders a stake in the resource; increase the number of permits that are transferred; and ease administrative burdens on the state.

The opinion of the superior court, and the arguments of the Ostroskys, focus not on the foregoing purposes but on those identified in *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1265 (Alaska 1980), namely, (1) enhancing the economic benefit to fishermen; (2) conserving the fishery; (3) avoiding unjust discrimination in the allocation of a limited number of entry permits; and (4) administrative convenience. While the objectives identified by the state are by no means unrelated to those expressed in *Apokedak*, the latter should be understood to be the overall objectives of a limited entry system.

Once the decision to institute a limited entry system is made, the question of how entry permits are to be transferred necessarily must be answered. The purposes of the transfer method will not necessarily be identical to general purposes of limited entry. As we noted in *Apokedak*, 606 P.2d at 1264 & n 39:

> Seldom, if ever, will a statutory scheme, especially one as complicated as the Limited Entry Act, have a single monolithic purpose. The legislature usually acts with

a variety of purposes in mind and each of these purposes deserves judicial recognition.[39]

Each of the objectives identified by the state as purposes of free transferability was discussed in the extensive legislative hearings preceding passage of the Act. Thus, they may not be regarded as after the fact hypotheses. Further, the objectives are legitimate and they are fairly and substantially furthered by free transferability. We hold, therefore,that the equal protection clause of the state constitution is not violated by the transfer provisions of the Act.

The same analysis is applicable, and yields the same conclusion as to federal equal protection.

The judgment of the superior court is REVERSED.

RABINOWITZ, Justice, dissenting.

I

I agree with the majority's suggestion that the conflict in constitutional provisions in this case is properly resolved by allowing the legislature to adopt a system of limited entry, but only through the means which are least restrictive upon other rights guaranteed in the constitution. Beyond the statement of this principle, however, I cannot agree with the application given the less restrictive alternative test to the "free transferability" system implemented by AS 16.43.170(b) and 16.43.150(h).

Free transferability impairs rights guaranteed by three separate clauses of the Alaska Constitution. The "common use" clause in Article VIII, section 3 provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

[39] This is not to say that the judiciary is required to hypothesize or invent purposes, something *Isakson's* intensified scrutiny test specifically rejects. Close examination of the statutory scheme will usually yield several concrete legislative purposes having a substantial basis in reality, even if these purposes are not specifically identified in a statutory purpose clause.

The first sentence of Article VIII, section 15 states:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Finally, Article I, section 1 provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[1]

In the absence of legislation pursuant to the second sentence of Article VIII, section 15,[2] the "resource" of the gear fisheries is reserved to the people for common use. The common use clause necessarily contemplates that resources will remain in the public domain, and will not be ceded to private ownership. Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state.[3]

The enabling language of Article VIII, section 15 makes some inroads upon the application of the common use clause to the gear fisheries. Any system of limited entry, no matter how it is effectuated, will at any one time exclude a portion of the population from the resource. This observation, however, does not warrant the further conclusion that the common use

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[1] *See also* the "natural resources equal protection clause" in Article VIII, section 17.

[2] Article VIII, section 15, provides in relevant part:

> This section does not restrict the power of the State to limit entry into any fishery for purpose of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

As noted by the majority, without this enabling language the entire limited entry statute would likely be unconstitutional.

[3] I would hold that the state bears a high burden of showing the substantiality of its interests throughout our equal protection examination. Thus, I specifically disagree with the majority's conclusion that "[t]he transferability provisions of the Act is not of a high order." In addition to the common use clause, *see* Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980) ("important right to engage in economic endeavor"); *see also* Hilbers v. Municipality of Anchorage, 611 P.2d 31, 40 (Alaska 1980).

clause is rendered a nullity with respect to entry legislation. In my view, Article VIII, section 3 still mandates that limited entry be achieved through the least possible "privatization" of the common resource.

Examined in these terms, free transferability makes the Limited Entry Act the most restrictive scheme possible under the common use clause. The ability to use and derive value from the gear fishery resource is dependent upon possession of a gear license, and these licenses are designed to operate as private property. The initial "grantees" enjoy the ability to sell, assign, or pass on to their heirs their share of the gear fishery resource. Most importantly, the holder's right to the license never expires; the holder's heirs may hold it forever. Alternatively, they may sell it and realize a return based upon its value as an asset held in perpetuity. Under the free transferability system, none of the value of the resource is retained or ever returns to the state and the people.

In addition, I conclude that AS 16.43.170(b) and 16.43.150(h) create an "exclusive" right or "special privilege" within the meaning of Article VIII, section 15. Initial grantees were presented with a windfall at the expense of all other persons in the state. Public rights were extinguished in order to create exclusive private interests of sometimes enormous value. Under the equal protection clause, the populace was divided into two categories: those who would receive this great boon from the state, and those who would forever lose their share in the resource unless they someday "bought it back" through the purchase of a gear license.

Given the infringements upon the constitutional interests which I have described, free transferability would still be permissible under Article VIII, section 15 if it were necessary to a feasible system of limited entry. I believe, however, that the Ostroskys have presented a substantially less restrictive alternative that furthers all of the purposes which underlie free transferability.

The Ostroskys' principal objection to free transferability is that licenses never expire. One alternative they suggest is

that licenses should be issued only for a term of years, reverting to the state for redistribution upon expiration. In this way, the state would recapture control of the resource periodically and reassign it to the legislatively-determined appropriate recipients. Thus, the common resource would not be transferred forever to a discrete private class. The state and the people would have the recurring ability to allocate use rights.[4]

Under the proposed alternative, the length of the license term would be a matter for the discretion of the legislature, within constitutional limits. Article VIII, section 15, authorizes the state to create a limited entry scheme designed to "prevent economic distress among fishermen and those dependent upon them for a livelihood." This authorizes the state to define licenses in a way that makes it economically practical for license holders to fish. Given this authorization, the constitution recognizes that license may be granted for a sufficiently long period that the holder may be expected to recoup his investment in gear and vessel, and realize a reasonable return. Any license which goes beyond the level of reasonable economic attractiveness, and does so at the expense of the constitutional rights of others, is prohibited.

Similarly, the method of redistribution following expiration is also a matter of legislative choice, to be exercised within

[4] The Ostroskys' "free transferability plus expiration" alternative serves all of the purposes advanced in support of the existing scheme. The alternative "prevents economic distress among fishermen and those dependent upon them" by protecting the family's source of income during the life of the permit even if the original holder dies or is disabled. It retains the "traditional mobility" of fishermen by allowing for the sale of limited-term permits. It encourages conservation of the fisheries by license-holders, who still have a direct economic stake in the health of their fishery. It discourages the creation of a closed class of fishermen by making this impossible; transfers of permits are still encouraged by the possibility of sale for money. It allows for planning and prudent investment by making the acquisition of a permit certain by the payment of the purchase price. It does not unduly complicate the transfer scheme. It retains the feature of limited involvement in transfers on the part of the CFEC. The commission's burden is increased only in that it must periodically reissue the licenses. In my opinion, free transferability plus expiration advances all of the above state goals equally as well as does the existing scheme of free transferability minus expiration.

constitutional bounds. One proposal made by the Ostroskys is that reissuance should be made by lottery. This would prevent any danger of the licenses remaining in the hands of a closed class. Any plan which effectively guaranteed renewal would be subject to the same criticisms at the current free transferability plan.

The Ostroskys' suggestion does not actually require any change in the existing transferability scheme. Licenses may still be sold and inherited. The crucial difference is in the nature of the thing transferred. Licenses would resemble a lease interest in the resource as opposed to an outright ownership interest. They would still have value—possibly considerable value—and that value would be privately held. The distinguishing feature of free transferability with expiration is that something of the people's common use rights are still held by the state. Privatization of the common use interest is not effected to a degree well beyond what is necessary to implement an economically feasible limited entry system.

Because the Ostroskys have proposed an alternative for a feasible entry system which is less restrictive of the public's rights in the gear fishery resource, I would hold that the present statute is invalid under Alaska's Constitution.[5]

II.

I further disagree with the majority's discussion of the state's interest in the goals furthered by AS 16.43.170(b) and 16.43.150(h). The court's opinion appears to dismiss the importance of the overall objectives of the limited entry statute to the equal protection scrutiny of transferability provisions. It is true that specific sections within a complex statute will be designed to serve narrow purposes subsidiary to the statute's larger goals. It is also true that these narrow purposes may properly be asserted by the state in attempting to meet its burden under the state equal protection clause. The legitimacy of these subsidiary purposes, however, is seriously

[5] Alternatively, I would order supplemental briefing in the case to allow the state to address the alternative of free transferability plus expiration.

undermined if they are found to conflict with the greater goals of the statutory scheme as a whole.

Under AS 16.43.010, the legislature has declared that "[i]t is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination." This statement of legislative intent does more than provide that one goal of the CFEA is to comport with the constitution. Decisions of this court have made it clear that the statute's policy of avoiding unjust discrimination extends further than to classifications forbidden by the constitution. *Commercial Fisheries Entry Commission v. Apokedak* 606 P.2d 1255, 1268 (Alaska 1980).

In evaluating the strength of the state's interest in the goals behind the system of free transferability, it is incumbent upon this court to weigh the Ostroskys' argument that the legislatively-created "free market" for gear licenses discriminates on the basis of wealth[6] I would hold that the broad statutory anti-discrimination purpose of the CFEA militates against any system of transferability which makes gear licenses available only to the extremely wealthy. Certainly the state's interest in the current transferability provisions is diminished by the provisions' tendency to create such a classification.

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[6] I am also in disagreement with the court's observations that the Limited Entry Act discriminates on the basis of wealth only in the manner that any price does, and I further disagree that liquor licenses and utility franchises furnish appropriate analogues. These assumptions overlook the constitutional status of the right allocated by the Limited Entry Act and the fact that here the relevant "free market" is one which was created legislatively and one which perpetuates and aggravates economic disparities.

APPENDIX II

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA *Appellant,* vs. LORI L. OSTROSKY, JULIANNE OSTROSKY and HAROLD C. OSTROSKY, *Appellees.*	No. 6336
LORI L. OSTROSKY, JULIANNE OSTROSKY, *Cross-Appellants,* vs. STATE OF ALASKA, *Cross-Appellee.*	No. 6373

CERTIFICATE OF SERVICE

COMES NOW Robert H. Wagstaff, a member of the Bar of the Supreme Court of the United States, and certifies that on August 31, 1983 he filed in open Court a Notice of Appeal to the Supreme Court of the United States herein, and personally served a member of the State District Attorney's Office. Additionally, on September 2, 1983, I caused to be mailed in the United States mail, postage prepaid, a copy of the Notice of Appeal to the Attorney General of the State of Alaska.

DATED this 2nd day of September, 1983, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Ostroskys

Robert H. Wagstaff

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA *Appellant,* vs. LORI L. OSTROSKY, JULIANNE OSTROSKY and HAROLD C. OSTROSKY, *Appellees.*	No. 6336
LORI L. OSTROSKY, JULIANNE OSTROSKY, *Cross-Appellants,* vs. STATE OF ALASKA, *Cross-Appellee.*	No. 6373

NOTICE OF APPEAL

COMES NOW Robert H. Wagstaff, counsel for Appellees/Cross-Appellants LORI L. OSTROSKY, JULIANNE OSTROSKY, and HAROLD C. OSTROSKY, and gives notice of appeal to the Supreme Court of the United States from this Court's Opinion No. 2702 dated July 19, 1983. This appeal is taken pursuant to 28 USC 1257(2).

DATED this 2nd day of September, 1983, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Appellees/Cross-Appellants

Robert H. Wagstaff

APPENDIX III

Sec. 16.43.010. Purpose and findings of fact. (a) It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.

(b) The legislature finds that commercial fishing for fishery resources has reached levels of participation, on both a statewide and an area basis, that have impaired or threaten to impair the economic welfare of the fisheries of the state, the overall efficiency of the harvest, and the sustained yield management of the fishery resource. (§ 1 ch 79 SLA 1973)

Sec. 16.43.020. Alaska Commercial Fisheries Entry Commission. (a) There is established the Alaska Commercial Fisheries Entry Commission as a regulatory and quasi-judicial agency of the state. The commission consists of three members appointed by the governor and confirmed by the legislature in joint session.

(b) The governor shall designate one member of the commission as chairman of the commission. The member designated shall serve as chairman for a term of two years, and may be designated chairman for successive two-year terms. (§ 1 ch 79 SLA 1973)

Sec. 16.43.140. Permit required. (a) After January 1, 1974, no person may operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.

(b) A permit is not required of a crewman or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

(1) fishing more than one type of gear;

(2) fishing in more than one administrative area;

(3) harvesting particular species for which separate interim-use or entry permits are issued. (§ 1 ch 79 SLA 1973)

Section 16.43.150. Terms and conditions of entry permit: annual renewal. (a) Each entry permit authorizes the permittee to operate a unit of gear within a specified administrative area.

(b) The holder of an entry permit shall have the permit in his possession at all times when engaged in the operation of gear for which it was issued.

(c) Each entry permit is issued for a term of one year and is renewable annually.

(d) Failure to renew an entry permit for a period of two years from the year of last renewal results in a forfeiture of the entry permit to the commission, except as waived by the commission for good cause. An entry permit may not be renewed until the fees for each preceding year during which the entry permit was not renewed are paid. However, failure to renew an entry permit in a year in which there is an administrative closure for the entire season for a specific fishery is good cause not to renew the entry permit. The commission shall waive the payment of fees for that year.

(e) An entry permit constitutes a use privilege which may be modified or revoked by the legislature without compensation.

(f) An entry permit survives the death of the holder.

(g) Except as provided in AS 16.10.333—16.10.337 and in AS 44.81.230—44.81.250, an entry permit may not be:

(1) pledged, mortgaged, leased, or encumbered in any way;

(2) transferred with any retained right of repossession or foreclosure; or

(3) attached, distrained, or sold on execution of judgement or under any other process or order of any court.

(h) Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of his estate. (§ 1 ch 79 SLA 1973; am §§ 1, 2 ch 73 SLA 1977; am § 6 ch 83 SLA 1978: am § 1 ch 51 SLA 1980; am § 2 ch 47 SLA 1981)

Sec. 16.43.170. Transfer of entry permits. (a) Entry permits and interim-use permits are transferable only through the commission as provided in this section and § 180 of this chapter and under regulations adopted by the commission.

(b) Except as provided in (c) of this section, the holder of an entry permit may transfer his permit to another person or to the commission upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer his permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.

(c) If the number of outstanding entry permits for a fishery is greater than the optimum number of entry permits established under §§ 290—300 of this chapter, the holder of an entry permit who qualified for that entry permit in a priority classification designated under § 250(c) of this chapter may transfer his permit only to the commission. The transfer to the commission shall be made under the buy-back provisions of §§ 310—320 of this chapter.

Sec. 16.43.250. Standards for initial issue of entry permits. (a) Following the establishment of the maximum number of units of gear for a particular fishery under § 240 of this chapter, the commission shall adopt regulations establishing qualifications for ranking applicants for entry permits according to the degree of hardship which they would suffer by exclusion from the fishery. The regulations shall define priority

classifications of similarly situated applicants based upon a reasonable balance of the following hardship standards:

(1) degree of economic dependence upon the fishery, including but not limited to percentage of income derived from the fishery, reliance on alternative occupations, availability of alternative occupations, investment in vessels and gear;

(2) extent of past participation in the fishery, including but not limited to the number of years participation in the fishery, and the consistency of participation during each year.

(b) The commission shall designate in the regulations those priority classifications of applicants who would suffer significant economic hardship by exclusion from the fishery.

(c) The commission shall designate in the regulations those priority classifications of applicants who would suffer only minor economic hardship by exclusion from the fishery. (§ 1 ch 79 SLA 1973)

Sec. 16.43.260. Applications for initial issue of entry permits. (a) The commission shall accept applications for entry permits only from applicants who have harvested fishery resources commercially while participating in the fishery as holders of gear licenses issued under AS 16.05.536—16.05.670 before the qualification date established in (d) or (e) of this section.

(b) The commission shall establish the opening and closing dates, places and form of application for entry permits for each fishery. The commission may require the submission of specific verified evidence establishing the applicant's qualifications under the regulations adopted under § 250 of this chapter.

(c) When an applicant is unable to establish his qualifications for an entry permit by submitting the specific verified evidence required in the application by the commission, he may request and obtain an administrative adjudication of his application according to the procedures established in § 110(b) of this chapter. At the hearing he may present alternative evidence of his qualifications for an entry permit.

(d) Except as provided in (e) of this section, an applicant

shall be assigned to a priority classification based solely upon his qualifications as of January 1, 1973.

(e) When the commission established the maximum number of entry permits for a particular fishery under § 240 of this chapter after January 1, 1975, an applicant shall be assigned to a priority classification based solely upon his qualifications as of January 1 of the year during which the commission establishes the maximum number of entry permits for the fishery for which application is made. (§ 1 ch 79 SLA 1973; am § 3 ch 126 SLA 1974)

Sec. 16.43.360. Penalties. (a) A person who violates a provision of this chapter or a regulation promulgated under this chapter, upon conviction, is guilty of a misdemeanor and is punishable by a fine of not more than $5,000 for a first conviction; a fine of not more than $10,000 for a second conviction; and, for a third conviction, a fine of not more than $10,000 as well as forfeiture of all interim-use permits and entry permits held by him and permanent loss of eligibility for interim-use permits or for entry permits.

(b) A person who makes a false statement of a material fact in the application for an interim-use permit or an entry permit or in the application for a transfer under §§ 170—180 of this chapter, or a person who assists another by making a false statement of a material fact in support of the other person's application for issuance of an interim-use permit or an entry permit or transfer of an entry permit, upon conviction, is guilty of a misdemeanor and shall forfeit all interim-use permits and entry permits held by him and shall lose eligibility for interim-use permits and for entry permits for a period of five years.

(c) If a permit holder is convicted of a violation of AS 43.20.335 and the violation relates to income derived from commercial fishing under this title, he shall forfeit all interim-use permits and entry permits held by him and shall lose eligibility for interim-use permits and for entry permits for a period of five years.

(d) If a permit holder is charged by the state with violating a provision of this chapter or a regulation adopted under this chapter, he may not transfer, under § 170 of this chapter, any interim-use or entry permit he may hold, until after the final adjudication or dismissal of the charges. (§ 1 ch 79 SLA 1973; am § 7 ch 73 SLA 1977)

No. 83-592

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LORI L. OSTROSKY, JULIANNE OSTROSKY, and HAROLD C. OSTROSKY,

Appellants,

vs.

STATE OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: (Cont.) Page

ALASKA STATUTORY PROVISIONS:

I. INTRODUCTION AND STATEMENT OF THE CASE

This is a motion to dismiss an appeal taken from the Alaska Supreme Court's decision in State v. Ostrosky, 667 P.2d 1184 (Alaska 1983) (copy attached as "Appendix I" to the Appellants' Jurisdictional Statement). The State of Alaska, appellee herein, alternatively requests this Court to summarily affirm the decision.

The Alaska Supreme Court held that the state laws which make permits for operating commercial fishing gear ("limited entry permits") freely transferable do not impermissibly discriminate on the basis of wealth and lineage, in violation of the equal protection clause of the fourteenth amendment to the United States Constitution. The Ostroskys, appellants herein, contend that this holding was incorrect. To appreciate how narrow this issue is, and that it does not present a substantial federal question, this Court must have more information about

Alaska's Limited Entry Act, AS 16.43.010 -- 16.43.380, than can be gleaned from the Ostroskys' Jurisdictional Statement.

A. Background of Limited Entry Act

Alaska's fisheries, and especially its salmon fisheries, are important to the State's inhabitants and to its economy. Fish and fishing, which have been of concern to Alaska since statehood, are discussed in two sections of Alaska's Constitution. Article VIII, section 3, states that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. art. VIII, § 3. Article VIII, section 15, further states that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Alaska Const. art. VIII, § 15.

Excessive commercial harvesting in the fisheries during the 1960's presented a tremendous threat to the fisheries and to the commercial fishermen economically dependent

upon them for their living. The electorate of the State recognized the need to protect its resources, and in 1972 amended Alaska's Constitution to explicitly authorize the State to limit the number of units of commercial fishing gear that can be operated in the State's fisheries. The amendment added the following language to article VIII, section 15: "This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State."

In response to this amendment, the State Legislature enacted the current version of the Limited Entry Act, AS 16.43.010 -- 16.43.380. Under the Act, the State determined which fisheries needed to be limited, how many permits to operate commercial fishing gear should be issued, and what criteria should be used to determine who

received the permits. Permits have been issued, and it is now illegal for any person to operate commercial fishing gear in a limited fishery unless he or she has a permit or is working for someone who has a permit. AS 16.43.140(a).

After the State decided to limit the number of persons who can operate commercial gear in certain fisheries, it had to decide whether limited entry permits should be transferable and, if so, on what basis. Following extensive hearings and debates, the Legislature decided that the interests it wanted to protect would be furthered most by making permits "freely transferable" to anyone able to participate actively in the fishery. Thus, as is true of traditional property rights, permits can be sold, transferred by gift, or bequeathed freely. If the holder of a permit does not make any inter vivos or testate disposition of it, the permit will pass to his or her spouse. If there is no surviving spouse, the permit will

then pass through intestate succession. AS 16.43.150(h); AS 16.43.170(b).

The interests that the State Legislature wanted to protect by making permits freely transferable are enumerated as follows in the Alaska Supreme Court's decision in State v. Ostrosky:

> [1] By making permits inheritable and transferable among family members, the Act ensures that a fishing family will be able to continue to fish if the permit holder dies or is disabled, thus protecting the family's source of income and its investment in vessel and gear. This prevents economic distress among fishermen and those dependent upon them for a livelihood.
>
> [2] By making it possible for a person who has fished one permit to purchase a different one, the Act allows fishermen to move to more profitable gear types (from hand troll to purse seine, for instance) and to fish a different area when their usual area has bad runs. This prevents economic distress among fishermen, and retains the traditional mobility. . . .
>
> [3] By making permits salable, the Act creates a market for them. Price depends largely on the state of the fishery. . . . Thus, in order to keep the fisheries healthy, fishermen will obey

conservation laws, assist in the apprehension of violators of those laws, and willingly contribute to aquaculture programs.

[4] By giving permit holders an incentive--money--to transfer their permits, the Act prevents the creation of a closed class of fishermen. . . . [T]he number of transfers to date has been very large.

[5] By making the acquisition of a permit certain by payment of the purchase price, the Act allows fishermen to plan where they will fish, what type of gear they will use and what investments in vessels and gear they can prudently make.

[6] By not setting up any complex eligibility formulas for new entrants, the Act makes the transfer system readily understandable to those it will affect.

[7] By not requiring the [Limited Entry] Commission to get involved in transfers to an extent beyond the simple processing of transfer applications and the certification that the proposed transferee has the present ability to fish, the Act eases the Commission's administrative burden, and allows it to focus its attention on other necessary duties, such as the setting of optimum numbers for limited fisheries and the decision whether presently open fisheries should be limited.

Appendix I at 19a-20a.

The three most important interests can thus be summarized as follows: (1) preventing economic distress to those dependent upon commercial fishing, (2) conserving the fisheries, and (3) avoiding unjust discrimination in the allocation of the permits.

B. Procedural History

The Ostroskys are three persons who wish to operate commercial fishing gear in Alaska's most valuable fishery, the Bristol Bay salmon fishery. They were not among the persons initially issued permits for this fishery, although Hank Ostrosky would have received one had he applied for it. See Appendix A. The Ostroskys contend that in 1979 they could not afford to purchase a permit or obtain one by other means. Despite their lack of a permit, they proceeded to fish in Bristol Bay. They were subsequently arrested and convicted for operating commercial gear and possessing commercially caught fish without valid entry permits. Their appeal arises from these convictions.

The Ostroskys moved for post-conviction relief in the State Superior Court under Alaska Rule of Criminal Procedure 35. They raised several constitutional arguments, based upon both the Alaska and the United States Constitutions. These arguments included the claim that the State laws making entry permits freely transferable impermissibly discriminate on the bases of wealth and lineage. The Alaska Superior Court concluded that the Ostroskys' arguments under the Federal Constitution were without merit. It held, however, that the transferability laws violate the equal protection clause of the Alaska Constitution. See State v. Ostrosky, Appendix I at 4a & n.3. On appeal, the Alaska Supreme Court reversed, finding all of the Ostroskys' arguments to be without merit. In particular, the Alaska Supreme Court held that the state laws making entry permits freely transferable have a fair and substantial relation to the legitimate interests

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sought to be protected by the State Legislature. Appendix I at 19a-21a.

C. Clarification of Appellants' Statements

The only issue that the Ostroskys have raised in this Court is whether AS 16.43.150(h) and AS 16.43.170(b), which make entry permits freely transferable, impermissibly discriminate on the bases of wealth and lineage in violation of the equal protection clause to the fourteenth amendment to the United States Constitution. Jurisdictional Statement at (i). The Ostroskys repeatedly suggest that much broader issues are before this Court. This inaccuracy is compounded by their suggestions that the Limited Entry Act has a far greater impact on fishing in Alaska than it does. The State will attempt to clarify the most significant overstatements made by the Ostroskys.

First, the Ostroskys state that "[t]here are two classes of people created by the Alaska Limited Entry Act: [t]hose families who are permitted to fish for salmon and

those who are not." Jurisdictional Statement at 7. This is inaccurate. The Limited Entry Act does not place any restrictions on "subsistence fishing" (taking fish from rural areas for personal use) or fishing for "personal use" (taking fish from other than rural areas for personal use). See AS 16.05.930. The Act also does not in any way restrict sport fishing, which all persons may engage in upon payment of a minimal fee. AS 16.05.330. Finally, the Act does not even regulate all commercial fishing. Not all fisheries have been limited, and anyone may operate commercial fishing gear in an open fishery. 1/ More important, however, anyone may participate in commercial fishing as a

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1/ It is only the salmon and herring fisheries that have been "limited," i.e., there are a finite number of permits available for operating commercial fishing gear to harvest salmon and herring. The halibut, sablefish, abalone, crab, shrimp, clams, and scallops fisheries, as well as other fisheries, have not been limited. 20 Alaska Admin. Code 05.010 -- 20 Alaska Admin. Code 05.990.

crew member for someone who holds a permit. AS 16.43.140(b). It is only operating commercial fishing gear in limited fisheries that has been restricted by the Act. AS 16.43.140(a). As a practical matter, the Limited Entry Act merely regulates the "big business" of commercial fishing. There are two classes of persons created by the Act, but they are not "[t]hose . . . who are permitted to fish for salmon and those who are not." Instead, the two classes are those who may run a commercial fishing business, and those who may not.

Second, the Ostroskys suggest that the criteria used to initially distribute the limited entry permits are at issue in this appeal. They state that the Limited Entry Act "gives fortuitously selected persons . . . commercial access to salmon in the significant fisheries of Alaska." Jurisdictional Statement at 2 (emphasis added). The initial recipients of entry permits were not "fortuitously selected." They were selected

on the basis of the degree of economic hardship they would suffer if they were not issued permits. AS 16.43.250(a). In a different case, the Alaska Supreme Court has already held that the ranking system established by the State Legislature to determine who would initially receive entry permits is constitutional. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980). That issue is not a part of the Ostroskys' appeal to this Court.

Third, the Ostroskys state that the Limited Entry Act gives the "heirs in perpetuity" of initial permit recipients "exclusive commercial access to salmon . . . in Alaska." Jurisdictional Statement at 2. This also is not accurate. The "heirs in perpetuity" of permit holders do not have guaranteed access to commercial fishing in Alaska. As the State has repeatedly indicated, entry permits are freely transferable. The heir of a permit holder can receive the permit, but only under the following

circumstances: (1) if the initial permit holder does not sell the permit to anyone else; (2) if the permit holder does not make a gift of the permit to someone else; (3) if the permit is not revoked by the State; and (4) if the permit holder does not bequeath the permit to someone other than his or her heirs. This is a far cry from being given "exclusive commercial access to salmon . . . in Alaska."

The Ostroskys' fourth overstatement is that "Alaska has created by its Limited Entry Act exclusive rights and special privileges in certain select families by giving these families perpetual rights in a publicly owned resource to the exclusion of all others forever." Jurisdictional Statement at 5. In fact, permits are issued only to individuals, and not to families. See AS 16.43.140(a). Furthermore, and at the heart of this appeal, these permits are freely transferable and thus have not been placed exclusively in the hands of a few, select individuals "forever."

Fifth, the Ostroskys suggest that permits may only be purchased by paying their entire cost in cash at the time of the sale. The Ostroskys state that they "were not born into a family which has been bestowed a limited entry permit, nor do they have the $100,000 necessary to buy a permit." Jurisdictional Statement at 4-5. The clear implication from this statement is that, without $100,000 in cash, the Ostroskys cannot obtain a permit. As noted by the Alaska Supreme Court, the average price of a permit is $50,000, rather than the $100,000 necessary to purchase a permit for the Bristol Bay fishery, which is the most valuable fishery in Alaska. State v. Ostrosky, Appendix I at 14a n.8. Thus, it is unusual that a permit costs $100,000. Even so, the State has created well-funded loan programs specifically designed to make it feasible for any person to purchase an entry permit. AS 16.10.310(a)(1).

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Under two different programs, the State can and does loan as much as either 90% or 100% of the appraised value of an entry permit to enable a person to purchase it. Depending upon the program, the loans may be for as much as or more than $100,000. Under either program, the interest rate cannot exceed 10.5%, and the loan may be for a term as long as 15 years. AS 16.10.-320(a). 2/ The Ostroskys fail to mention

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2/ The relevant necessary qualifications for a 90% loan are that the individual must have held a commercial fishing license (as a permit holder or as a crew member) for the year immediately preceding the date of the loan application and any other two of the past five years. Furthermore, the individual must have actively participated in the fishery during those periods. AS 16.10.-310(a)(1)(A). The relevant necessary qualifications for a 100% loan are that the individual does not have any other "occupational opportunities" besides commercial fishing, or that he or she is economically dependent upon commercial fishing for a livelihood and commercial fishing has been a "traditional way of life" for the individual. AS 16.10.310(a)(1)(B). These requirements ensure that the borrower has experience in commercial fishing, which increases the probability that the borrower will make a

these loan programs when asserting that the Limited Entry Act discriminates against the poor.

Sixth, this case is not the "functional culmination" of Bozanich v. Reetz, 297 F. Supp. 300 (D. Alaska 1969), rev'd, 397 U.S. 82 (1970) (Jurisdictional Statement at 7), nor is it identical to State v. Huse, 59 P.2d 1101 (Wash. 1936), as stated by the Ostroskys. Jurisdictional Statement at 11. In Bozanich, a federal district court ruled that a former version of Alaska's Limited Entry Act violated the equal protection clause to the fourteenth amendment because

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(Footnote continued)

profit in his business and thus be able to pay back the loan. The requirements are also consistent with a major purpose of the Limited Entry Act, which is to prevent economic distress to those fishermen who are economically dependent upon commercial fishing for their livelihood. If an individual does not have any prior experience in commercial fishing, he or she is not likely to be economically dependent upon commercial fishing.

the qualifications required to obtain a gear license (equivalent to an entry permit under the current Act) were "arbitrary and irrational." 297 F. Supp. at 306. The transferability of licenses was not at issue. The issue, instead, was the validity of the criteria used to determine who would receive the licenses in the first instance. That subject is not before the Court in this appeal. 3/

3/ Bozanich is further distinguishable because of its reliance upon Morey v. Doud, 354 U.S. 457 (1957), when concluding that the discrimination against certain fishermen violated equal protection. Morey v. Doud is the only case since 1950 in which this Court struck down an economic regulation on equal protection grounds alone. That decision was explicitly overruled in New Orleans v. Dukes, 427 U.S. 297 (1976), in which this Court stated that "the reliance on the statute's potential irrationality . . . was a needlessly intrusive judicial infringement on the State's legislative powers." 427 U.S. at 306. Accordingly, were Bozanich to be decided anew, it seems evident that a different result would be reached. As it is, the district court's decision in Bozanich was reversed by this Court on the basis that the district court should have abstained from deciding the case so that the issue could be

The Washington Supreme Court's decision in State v. Huse, 59 P.2d 1101 (Wash. 1936), also relied upon by the Ostroskys, is similarly distinguishable. Once again, the issue before that court was the constitutionality of the criteria used to determine who would receive gear licenses. The transferability of the permits was not before the court. Furthermore, the case was decided in 1936, long before New Orleans v. Dukes, 427 U.S. 297 (1976), was decided. See note 3 supra. Accordingly, Huse, like Bozanich, is of no precedential value in determining the issues raised by the Ostroskys. This appeal merely concerns the constitutionality of State laws that make limited entry permits freely transferable. These laws are, in

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(Footnote continued)

resolved by the state courts. Reetz v. Bozanich, 397 U.S. 82, 87 (1970).

short, economic regulations, which can easily withstand examination under the equal protection clause.

Finally, this appeal does not involve any issues of discrimination based upon residency, as suggested by the Ostroskys. See Jurisdictional Statement at 7, 11-12. Limited entry permits, like sport fishing licenses and commercial fishing licenses for crew members, may be held by anyone, resident or nonresident. The only difference between the three is that, in order to preserve the fisheries, the number of entry permits available has been limited. Tables indicating the significant number of permits initially issued to and currently held by nonresidents are attached as Appendix B.

Having established what is not at issue in this appeal, it is now possible to address the single, narrow issue that is before this Court: whether Alaska's laws making entry permits freely transferable violate the equal protection clause of the fourteenth amendment

to the United States because they impermissibly discriminate on the bases of wealth and lineage.

II. SUMMARY OF THE ARGUMENT

The Ostroskys correctly assert that the State has the power to preserve and regulate the exploitation of its valuable resources, including its salmon fisheries. Jurisdictional Statement at 8-9. The Ostroskys also correctly assert that the State must exercise this power in conformity with the United States Constitution. Id. (citing Toomer v. Witsell, 334 U.S. 385 (1948); Douglas v. Seacoast Products, 431 U.S. 265 (1977)). The Ostroskys are not correct, however, in asserting that the State has violated the Constitution by making entry permits freely transferable.

The only means by which this Court could conclude that the State laws at issue violate equal protection would be by creating new law in this area. Under this Court's existing

decisions, there simply is no authority supporting the Ostroskys' constitutional claims. There are several reasons why these claims must fail.

First, the transferability provisions do not create any classifications based upon lineage because the heirs of a permit holder do not have an absolute right to receive the permit. The equal protection clause of the fourteenth amendment can only be violated if a state law creates impermissible classifications. If a state law does not create classifications at all, it cannot create impermissible classifications.

Second, to the extent that the transferability provisions do create classifications, based on wealth, or even lineage, the proper standard of review to be applied by this Court is the rational basis test. A higher standard of review would be inappropriate, first, because operating commercial fishing gear is not a fundamental right for purposes of equal protection analysis under the United

States Constitution, and second, discrimination on the bases of wealth and lineage does not create suspect or quasi-suspect classifications.

Finally, the State laws making limited entry permits freely transferable are rationally related to the legitimate State interests of (1) preventing economic distress to those dependent upon commercial fishing, (2) conserving the fisheries, and (3) avoiding unjust discrimination in the allocation of the permits. Accordingly, these laws do not violate the equal protection clause of the fourteenth amendment.

III. ARGUMENT

A. The Transferability Provisions Do Not Create "Lineage-Based Classifications"

The Ostroskys assert that the State laws governing the transferability of entry permits create classifications based upon lineage. Jurisdictional Statement at 12. The Ostroskys have not cited any reported decisions or treatises that discuss "lineage-

based classifications," and it is not entirely clear what they mean by the term. It is unreasonable to suppose that a classification based upon lineage is created every time a benefit conferred upon an individual is inheritable. To do so would be to suggest that governmental entities may only grant a life-estate in the benefits they confer upon individuals.

Presumably, a lineage-based classification is one by which a benefit is conferred upon an individual and his or her heirs only. This would be in the nature of a "fee tail," reminiscent of the feudal era. When a fee tail is granted, all persons except the heirs of the initial grantee are discriminated against with respect to being able to obtain the benefit or property at issue. Alaska's laws governing the transferability of entry permits obviously do not create this type of classification because, once again, the permits are freely transferable. Accordingly, the State's laws making limited entry

permits freely transferable do not create classifications based upon lineage.

The equal protection clause of the fourteenth amendment is violated only if a state law creates impermissible classifications. A state law that does not create any classifications cannot be held to create impermissible classifications. Thus, making entry permits freely transferable does not violate equal protection simply because the permits have value and are inheritable.

B. To the Extent that the Transferability Provisions Do Create Classifications, the Proper Standard of Review to be Applied is the Rational Basis Test

Assuming that the State laws making limited entry permits freely transferable do create classifications on the bases of both wealth and lineage, then they do discriminate on those bases. This Court has repeatedly held, however, that most legislative classifications do not violate equal protection:

> The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. . . . [Citation

omitted.] Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271-72 (1979). As this Court stated in New Orleans v. Dukes, 427 U.S. 297, 303-04 (1975):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude . . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along the suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the

> wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Thus, the "rational basis" standard of review is the appropriate test to apply to determine whether these laws violate equal protection, unless the laws impinge upon a fundamental right or create suspect or quasi-suspect classifications.

> 1. Operating commercial fishing gear in certain designated fisheries is not a fundamental right under the equal protection clause of the United States Constitution

Alaska's laws making entry permits freely transferable do not impinge upon any right recognized as "fundamental" under the equal protection clause of the United States Constitution. The Ostroskys claim that the State's laws making entry permits freely transferable have the effect of preventing them from operating commercial fishing gear in the Bristol Bay salmon fishery. They contend that this effect impinges upon their "right to engage in a chosen occupation."

Having "established" these premises, the Ostroskys assert that the right to engage in a chosen occupation is a "sensitive and fundamental personal right." Jurisdictional Statement at 11.

The right to engage in a chosen occupation is unquestionably important, but it is not "fundamental" under the equal protection clause of the United States Constitution. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-89 (1955). The decisions cited by the Ostroskys, Hicklin v. Orbeck, 437 U.S. 518 (1978), Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978), and Toomer v. Witsell, 334 U.S. 385 (1948), only address the issue of whether it is permissible to discriminate against nonresidents under the privileges and immunities clause of the United States Constitution. The Ostroskys apparently fail to appreciate that the rights and interests protected under the privileges and immunities

clause are broader than, rather than co-extensive with, the rights and interests protected by heightened scrutiny under the equal protection clause. As this Court stated in San Antonio School District v. Rodriguez, 411 U.S. 1, 33-34 (1973):

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether [a particular right] is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether [the right is] explicitly or implicitly guaranteed by the Constitution.

The right to engage in a chosen occupation is not explicitly or implicitly guaranteed by the Constitution. Accordingly, the Ostroskys' allegation that their right to operate commercial fishing gear in Bristol Bay has been impinged upon by the State's statutes does not require this Court to depart from the rational basis standard of

review applicable when reviewing economic regulations for violations of equal protection.

2. Discrimination on the basis of wealth or lineage does not create suspect or quasi-suspect classifications

The Ostroskys next contend that the State's laws at issue in this appeal should be reviewed under a higher standard than the rational basis test because those laws create suspect or quasi-suspect classifications. Jurisdictional Statement at 11-13. This contention is unsupported by the decisions of this Court.

As previously indicated, the State laws making entry permits freely transferable do not create "lineage-based classifications." Even if this Court were to view the issue differently, however, the Ostroskys have submitted no authority in support of their contention that economic regulations creating lineage-based classifications are to be reviewed with closer scrutiny than the

normally applicable rational basis test. The Ostroskys have cited Jimenez v. Weinberger, 417 U.S. 628 (1974) (Jurisdictional Statement at 12-13), but it only addresses classifications based upon legitimacy. There is a great difference between classifications based upon legitimacy and classifications based upon "lineage." Unlike illegitimate children, nonheirs are not a discreet and insular minority, historically discriminated against or otherwise in need of special protection under the Federal Constitution. Accordingly, there is no authority for the proposition that State laws allegedly discriminating on the basis of lineage are to be reviewed under a higher standard than the rational basis test.

To the extent that Alaska's statutes make classifications on the basis of wealth, there is still no basis for reviewing the laws under anything other than the rational basis standard of review. This Court specifically stated in San Antonio School District

v. Rodriguez, 411 U.S. 1, 29 (1973), that it "has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny."

Even if this Court eventually were to hold that certain forms of wealth discrimination must meet a higher standard of scrutiny than the rational basis test, the "wealth discrimination" complained of in this case would not be included in the Court's list. San Antonio indicates that, whatever else this Court may hold in the future, the rational basis standard of review will remain applicable when the challenged regulation does not cause an absolute deprivation of the desired benefit. Id. at 23-24. That is the situation presented by this case.

Although the State's laws making entry permits freely transferable arguably make it more difficult for poor persons to obtain entry permits because the permits have a market value, these persons are not absolutely deprived of the privilege of commercially

fishing in Alaska. The State's extensive loans programs alleviate much of the burden placed upon poor people who wish to obtain entry permits. Furthermore, no one is precluded from participating in commercial fishing as a crew member for someone who holds a valid permit. A person can acquire sufficient experience and money as a crew member to purchase or finance his or her own permit. Additionally, no one is precluded from operating commercial fishing gear in any of the fisheries that have not been limited. Finally, there are several means by which anyone may obtain a permit without paying the fair market value for it. Inasmuch as permits are freely transferable, anyone may receive a permit as a gift from the holder. Also, a person may receive a permit as the legatee of a deceased holder. Similarly, a person may receive a permit upon the death of the holder if that person is the heir of the holder and the holder did not make any other disposition of the permit. Thus, the State's

laws making entry permits freely transferable do not absolutely deprive poor persons of the privilege of commercially fishing in Alaska. Accordingly, there is no basis for applying a heightened standard of review to the wealth-based classification arguably created by the laws.

C. The State's Laws Making Entry Permits Freely Transferable Are Rationally Related to Legitimate State Interests

The Alaska Supreme Court held that the State laws making entry permits freely transferable are based on legitimate public purposes. It further held that the classifications created by the State laws are reasonable, not arbitrary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. Appendix I at 17a-21a. The Ostroskys have failed to discuss these holdings. Apparently, they recognize that Alaska's statutes making permits freely transferable are rationally related to legitimate state interests.

This Court noted in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981):

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, 440 U.S., at 111.

This Court further stated in United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980):

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," Flemming v. Nestor, 363 U.S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.

The closest the Ostroskys come to discussing the State's interests in making entry permits freely transferable, or the relationship between those interests and the statutes at issue, is the following single paragraph:

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> The original issuance of limited entry permits required that the applicants be ranked according to the degree of economic dependence upon the fishery, the extent of past participation, the availability of an alternative occupation, and the investment in gear and vessel. A.S. 16.43.250. As questionable as these original issuing criteria are, any subsequent transfers by inheritance or windfall purchase bears no relationship to these stated purposes.

Jurisdictional Statement at 11. Even this does not discuss the purposes of the Limited Entry Act, let alone the State's reasons for making the permits freely transferable.

Three of the major purposes of the Limited Entry Act are: (1) to prevent economic distress to those dependent upon commercial fishing; (2) to conserve the fisheries; and (3) to avoid unjust discrimination in the allocation of the limited number of permits. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1265 (Alaska 1980). Making entry permits freely transferable is rationally related to each of these legitimate purposes.

The State's laws making permits freely transferable prevent economic distress to those dependent upon commercial fishing in at least two ways. First, if a permit holder dies or becomes disabled, the permit may be transferred to another member of the family, who can continue running the commercial fishing operation. If transferring the permit were not allowed, the family faced with such a situation would obviously sustain economic hardship as a result of not being able to continue the commercial operation. Second, if the fishery for which a person holds a permit is not doing well, that person can continue his or her commercial fishing operations by purchasing a permit (as anyone else can) for another area that is doing better. If permits were not freely transferable, the individual faced with this situation would obviously sustain economic hardship because he or she could not make a living from operating his or her gear in the area designated in the permit.

The laws making permits freely transferable also further the purpose of conserving the fisheries. By letting permits be sold, the laws create a market for them. This gives permit holders a "stake" in the fishery because their permits will obviously be worth more if the fishery is doing well. In turn, this "stake" in the fishery provides permit holders with an incentive to conserve the fishery, rather than exploit it, so that permit values will become and remain high. It similarly encourages the permit holder to report known violations of fish and game laws, thereby assisting the State in preventing others from exploiting the fishery.

Making permits freely transferable also furthers the purpose of avoiding unjust discrimination in the allocation of the permits because all persons have an equal opportunity to purchase or receive permits from those who have them. If permits are not freely transferable, then some criteria or standard would have to be adopted by the State to determine

how and to whom they would be transferred. Any such criteria or standard would be vulnerable to the very arguments made by the Ostroskys in this case; namely, that some segment of the population is being impermissibly discriminated against.

Finally, making entry permits freely transferable prevents a closed class of persons from holding the permits. Statistics kept by the State demonstrate that permits are being transferred, as intended by the State. Appendix C.

In accordance with Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981), New Orleans v. Dukes, 427 U.S. 297, 297 (1975), and Dandridge v. Williams, 397 U.S. 471, 485-86 (1970), Alaska's challenged laws rationally further legitimate State interests, and thus do not violate the equal protection clause of the fourteenth amendment.

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IV. CONCLUSION

This appeal presents a very narrow question to this Court. It does not involve the constitutionality of limiting entry into the commercial fishing industry. It also does not involve the constitutionality of the criteria used to initially distribute the entry permits. Finally, it does not involve any issues of distinctions based on residency.

There is only one issue raised in this appeal: whether Alaska's laws making limited entry permits freely transferable violate the equal protection clause of the fourteenth amendment to the United States Constitution. There are no fundamental interests at issue, and the State's laws do not create suspect or quasi-suspect classifications. The laws are merely economic regulations.

Thus, the only determination that need be made is whether Alaska's laws are rationally related to legitimate state interests. The State has demonstrated that they are.

The arguments presented in the Ostroskys' Jurisdictional Statement do not indicate that this is a close question. The constitutionality of these economic regulations is sufficiently apparent so that this Court should either dismiss the Ostroskys' appeal, because it fails to present a substantial federal question, or summarily affirm the Alaska Supreme Court's decision in this case.

Respectfully submitted,

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APPENDIX A

AFFIDAVIT

I, Deborah S. Boyd, of the Commercial Fisheries Entry Commission, Pouch KB, Juneau, Alaska 99811, do hereby swear that the following is true to the best of my knowledge and belief:

1. I am an Application Technician for the Commercial Fisheries Entry Commission and in that capacity, custodian of all commercial fishing licensing and landing records for those fisheries under entry limitation.

2. Based upon a review of these records the Commission could have verified twenty-two (22) points Harold C. Ostrosky toward an entry permit application for the Bristol Bay drift gill net fishery as described below:

   3 points - 1971 gear license holder participation
   2 points - 1970 gear license holder participation
   3 points - 1969 gear license holder participation and consistent participation (20 AAC 05.630(a)(1))
   8 points - 1960 and 1962-68 gear license holder participation (20 AAC 05.630(a)(2) and 20 AAC 05.630(a)(3))
   6 points - investment in vessel (20 AAC 05.630(b)(3)(a))

   22 points - total

3. Other points could not be verified from state records but might be verified by submission of tax returns (20 AAC 05.630(b)(1) and affidavits of his actual fishing history in the years 1970 and 1971(consistent participation).

Further affiant sayeth not.

Date: January 20, 1982

Deborah S Boyd
Signature

Subscribed and sworn to before me this 20th day of January, 1982.

Karen T. Wells
Notary Public for Alaska
Commission Expires 8-7-85

(Permits were awarded to applicants who could verify 17 or more points.)

Table 3

Total Number of Initial Permit Holders by Fishery and Resident Type, 1975-1982*

	All Permits Issued To					All Transferable Permits Issued To**					All Permits	
	RURAL LOCAL	RURAL NO-LOC	URBAN LOCAL	URBAN NO-LOC	NON-RESIDENT	RURAL LOCAL	RURAL NO-LOC	URBAN LOCAL	URBAN NO-LOC	NON-RESIDENT	ALASKAN TOTAL	GRAND TOTAL
Limited in 1975												
Southeast Seine	92	0	119	0	284	92	0	119	0	284	211	515
Southeast Drift	82	1	225	3	156	82	1	225	3	156	311	467
Power Troll	288	3	452	9	277	288	3	452	9	277	666	943
Yakutat Set Net	124	3	0	21	18	124	3	0	21	18	148	166
PWS Seine	166	6	14	18	55	166	6	14	18	55	204	259
PWS Drift	334	19	11	28	139	334	19	11	28	139	392	531
PWS Set Net	17	0	4	2	7	17	0	3	2	7	23	30
Cook Inlet Seine	47	0	29	1	0	47	0	29	1	0	77	77
Cook Inlet Drift	189	8	242	12	184	189	8	242	12	184	371	555
Cook Inlet Set Net	193	24	445	24	56	193	24	445	24	56	688	744
Kodiak Seine	75	14	159	28	188	75	14	159	28	188	268	456
Kodiak Beach Seine	11	2	18	1	2	18	1	17	1	1	32	34
Kodiak Set Net	42	2	78	14	50	42	2	78	14	50	136	186
Chignik Seine	29	12	0	28	21	29	12	0	28	21	69	90
Pen/Aleutian Seine	101	0	0	3	14	101	0	0	3	14	104	118
Pen/Aleutian Drift	98	0	0	14	44	98	0	0	14	44	112	156
Pen/Aleutian Set Net	96	0	0	8	7	96	0	0	8	7	104	111
Bristol Bay Drift	641	129	0	224	732	641	129	0	224	732	994	1726
Bristol Bay Set Net	575	38	0	163	150	506	29	0	148	137	768	918
	3032	255	1794	593	2224	2962	253	1794	584	2219	5678	7902
Limited in 1976												
Upper Yukon Gill Net	56	3	12	1	1	56	3	12	1	1	72	73
Upper Yukon Fishwheel	113	2	14	1	0	113	2	14	1	0	130	130
Kuskokwim Gill Net	663	1	170	0	0	661	1	170	0	0	834	834
Kotzebue Gill Net	53	1	157	7	1	53	1	157	7	1	218	219
Lower Yukon Gill Net	688	1	8	11	1	688	1	8	11	1	708	707
Norton Sd Gill Net	174	1	23	2	0	174	1	23	2	0	200	200
	1747	15	376	22	3	1745	15	376	22	3	2160	2163
Limited in 1977-78												
SE Herr Seine	1	0	39	0	3	1	0	39	0	3	48	43
SE Herr Gill Net	3	0	43	1	10	3	0	43	1	10	49	59
PWS Herr Seine	27	20	3	35	8	27	20	3	35	8	85	93
Cook Inlet Herr Seine	24	1	24	15	3	24	1	24	15	3	44	69
	57	21	109	51	26	57	21	109	51	26	236	264
Limited in 1980												
Hand Troll	287	1	366	9	33	287	1	366	9	33	663	696
PWS Herr Gill Net	13	0	7	0	4	13	0	7	0	4	20	24
	300	1	373	9	37	300	1	373	9	37	683	720
Overall Total	5134	292	2654	677	2290	5064	290	2652	662	2276	8759	11049

* The table includes 18 permits which were later revoked because of administrative error, forfeit, or criminal action.
** By 1982 twelve non-transferable permits had become transferable through adjudication and one transferable permit had become non-transferable through re-examination of points awarded.

Reprinted from draft of E. Dinneford, N. Kamali & K. Schelly, Changes in the Distribution of Alaska's Limited Entry Permits, 1975-1982 (2d ed. 1983)

APPENDIX B

Table 4

1982 Year-End Distribution of Permit Holders by Fishery and Resident **DRAFT**

	All Permits Held By						All Transferable Permits Held By**						All Permits	
	RURAL LOCAL	RURAL NO-LOC	URBAN LOCAL	URBAN NO-LOC	NON-RESIDENT	DOC	RURAL LOCAL	RURAL NO-LOC	URBAN LOCAL	URBAN NO-LOC	NON-RESIDENT	DOC	ALASKAN TOTAL	GRAND TOTAL
Limited in 1975														
Southeast Seine	62	0	121	2	229	0	62	0	121	2	229	0	185	414
Southeast Drift	82	1	231	3	149	0	82	1	231	3	149	0	317	466
Power Troll	203	2	491	17	224	3	203	2	491	17	224	3	716	940
Yakutat Set Net	120	4	0	19	21	0	120	4	0	19	21	0	143	164
PWS Seine	138	15	15	29	70	0	138	15	15	29	70	0	189	259
PWS Drift	302	20	11	51	147	0	302	20	11	51	147	0	384	531
PWS Set Net	19	1	3	4	3	0	19	1	2	4	3	0	27	30
Cook Inlet Seine	38	1	36	0	2	0	38	1	36	0	2	0	75	77
Cook Inlet Drift	96	5	268	7	177	2	96	5	268	7	177	2	378	555
Cook Inlet Set Net	177	28	476	11	52	0	177	28	476	11	52	0	692	744
Kodiak Seine	77	10	171	26	92	0	77	10	171	26	92	0	284	376
Kodiak Beach Seine	7	2	19	2	3	1	4	1	18	2	2	1	31	34
Kodiak Set Net	15	5	104	12	50	0	15	5	104	12	50	0	136	186
Chignik Seine	38	10	0	24	18	0	38	10	0	24	18	0	72	98
Pen/Aleutian Seine	93	0	0	5	20	0	93	0	0	5	20	0	98	118
Pen/Aleutian Drift	80	3	0	14	59	0	80	3	0	14	59	0	97	156
Pen/Aleutian Set Net	81	3	0	10	15	0	81	3	0	10	15	0	94	109
Bristol Bay Drift	569	117	0	267	770	1	569	117	0	267	770	1	954	1724
Bristol Bay Set Net	447	45	0	210	214	0	388	39	0	199	281	0	702	916
	2636	272	1946	713	2315	7	2576	265	1944	702	2301	7	5574	7889
Limited in 1976														
Upper Yukon Gill Net	49	2	17	3	1	0	49	2	17	3	1	0	71	72
Upper Yukon Fishwheel	108	0	27	3	0	0	108	0	27	3	0	0	138	138
Kuskokwim Gill Net	658	4	166	9	2	0	658	4	166	9	2	0	829	831
Kotzebue Gill Net	48	3	152	13	3	0	48	3	152	13	3	0	216	219
Lower Yukon Gill Net	655	12	8	39	3	0	655	12	0	39	3	0	704	707
Norton Sd Gill Net	152	3	28	16	1	0	152	3	28	16	1	0	199	200
	1652	24	398	83	10	0	1652	24	398	83	10	0	2149	2159
Limited in 1977-78														
SE Herr Seine	1	0	36	0	3	2	1	0	36	0	3	2	39	42
SE Herr Gill Net	3	0	43	1	12	0	3	0	43	1	12	0	47	59
PWS Herr Seine	26	20	2	30	15	0	26	20	2	30	15	0	78	93
Cook Inlet Herr Seine	22	1	27	10	9	0	22	1	27	10	9	0	68	69
	52	21	108	41	39	2	52	21	108	41	39	2	224	263
Limited in 1980														
Hand Troll	285	3	364	18	34	0	285	3	364	18	34	0	662	696
PWS Herr Gill Net	16	0	6	0	2	0	16	0	6	0	2	0	22	24
	301	3	370	18	36	0	301	3	370	18	36	0	684	720
Overall Total	4641	328	2814	847	2488	9	4581	313	2812	836	2386	9	8631	11031

* This table excludes 18 permits which were revoked by the Commission.
** By 1982 twelve non-transferable permits had become transferable through adjudication and one transferable permit had become non-transferable through re-examination of points awarded.

Reprinted from draft of E. Dinneford, N. Kamali & K. Schelly, Changes in the Distribution of Alaska's Limited Entry Permits, 1975-1982 (2d ed. 1983)

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APPENDIX C

Reprinted from draft of E. Dinneford, N. Kamali & K. Schelly, Changes in the Distribution of Alaska's Limited Entry Permits, 1975-1982 (2d ed. 1983)

Table 1

Statewide Transfer Data on Permanent Permits by Year
1975 - 1982

Year	Number of Permanent Permits *	Number of Transferable Permits *	Yearly # of Transfers From Initial Issuees	Ratio of Transfers From Initial Issuees to Transferable Permits	Yearly Number of Transfers **	Ratio of Transfers to Transferable Permits
75	6,762	6,762	568	0.08	598	0.09
76	9,173	9,168	650	0.07	776	0.08
77	9,772	9,708	780	0.08	1,108	0.11
78	9,975	9,893	777	0.08	1,315	0.13
79	10,104	10,014	557	0.06	1,289	0.12
80	10,132	10,040	522	0.05	1,068	0.11
81	10,204	10,112	585	0.05	1,092	0.11
82	11,031	10,937	553	0.05	1,144	0.10

Years	Number of Transferable Permit-Years	Total Transfers From Initial Issuees	Ratio	Total Number of Transfers	Ratio
75 - 82	76,626	4,912	0.06	8,294	0.11

* 18 permits which have been revoked are excluded from the year of revoke forward.

**The number of transfers includes eleven loan foreclosures by the Department of Commerce and Economic Development and two transfers from the Department to other Alaskans.

APPENDIX D

Sec. 16.05.330. Licenses and tags required. (a) Except as otherwise permitted in this chapter, a person may not engage in sport fishing, including the taking of razor clams; in hunting, trapping, or fur dealing; in the farming of fish, fur, or game; or in taxidermy, without having the appropriate license or tag in actual possession.

(b) When obtaining the appropriate license or tag in (a) of this section, an applicant who asserts residency in the state shall provide the license vendor with the proof of residence that the department requires by regulation. (§ 1 art II ch 94 SLA 1959; am § 1 ch 61 SLA 1962; am § 1 ch 42 SLA 1968; am § 1 ch 140 SLA 1968)

Sec. 16.05.930. Exempted activities. . . .

. . . .

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs. . . .

Sec. 16.10.310. Powers of the department. (a) The department may

(1) make loans to

(A) individual commercial fishermen who have been state residents for a continuous period of two years immediately preceding the date of application for a loan under AS 16.10.300 — 16.10.370 and have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43 for the year immediately preceding the date of application and any other two of the past five years, and who actively participated in the fishery during those periods, for the purchase of entry permits;

(B) an individual who has been a state resident for a continuous period of two years immediately preceding the date of application for a loan under AS 16.10.300 — 16.10.370, who

(i) because of lack of training or lack of employment opportunities in the area of residence does not have occupational opportunities available other than commercial fishing; or

(ii) is economically dependent on commercial fishing for a livelihood and for whom commercial fishing has been a traditional way of life for the individual in Alaska, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of entry permits and gear, and for the construction and purchase of vessels; . . . .

Sec. 16.10.320. Limitations on loans. (a) A loan under AS 16.10.310 — 16.10.370

(1) may not exceed a term of 15 years;

(2) may not bear interest exceeding 10-1/2 percent;

(3) shall be secured by a first priority lien and appropriate security agreement; and

(4) may not exceed 90 percent of the appraised value of the collateral used to secure the loan, except that a loan granted under AS 16.10.333 for the purchase of an Alaska limited entry permit may not exceed an amount determined in accordance with (f) or (h) of this section.

. . . .

(d) Loans made to a borrower under AS 16.10.310(a)(1)(A) may not exceed a total of $300,000. Loans made to a borrower under AS 16.10.310(a)(1)(B) or (C) may not exceed a total of $100,000.

. . . .

(f) Except as permitted in (h) of this section, a loan made under AS 16.10.310(a)(1)(A) and (B) for the purchase of an Alaska limited entry permit may not exceed 90 percent of the appraised value of the collateral used to secure the loan.

. . . .

(h) A loan for an entry permit under AS 16.10.310(a)(1)(B) may be made for up to 100 percent of the appraised value of the collateral used to secure the loan if the borrower demonstrates that (1) the borrower has at least three years of experience as a commercial fisherman in the fishery to which the entry permit applies; and (2) the borrower has not owned an Alaska limited entry permit in the year immediately preceding the application for the loan. In this subsection "three years of experience as a commercial fisherman in the fishery" means that for an accumulated total of three fishing seasons in the same fishery the borrower has actively participated in the commercial harvest of fish under the direction of a limited entry permit holder.

Sec. 16.43.010. Purpose and findings of fact. (a) It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.

(b) The legislature finds that commercial fishing for fishery resources has reached levels of participation, on both a statewide and an area basis, that have impaired or threaten to impair the economic welfare of the fisheries of the state, the overall efficiency of the harvest, and the sustained yield management of the fishery resource. (§ 1 ch 79 SLA 1973)

Sec. 16.43.140. Permit required. (a) After January 1, 1974, a person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.

(b) A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

(1) fishing more than one type of gear;

(2) fishing in more than one administrative area;

(3) harvesting particular species for which separate interim-use or entry permits are issued. (§ 1 ch 79 SLA 1973)

Sec. 16.43.150. Terms and conditions of entry permit; annual renewal. . . .

(h) Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of the decedent's estate. (§ 1 ch 79 SLA 1973; am §§ 1, 2 ch 73 SLA 1977; am § 6 ch 83 SLA 1978; am § 1 ch 51 SLA 1980; am § 2 ch 47 SLA 1981)

Sec. 16.43.170. Transfer of entry permits. (a) Except as provided in AS 16.10.333 — 16.10.338 and in AS 44.81.230 — 44.81.250, entry permits and interim-use permits are transferable only through the commission as provided in this section and AS 16.43.180 and under regulations adopted by the commission.

(b) Except as provided in (c) and (e) of this section, the holder of an entry permit may transfer the permit to another person or to the commission upon 60 days' notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer the permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.

(c) If the number of outstanding entry permits for a fishery is greater than the optimum number of entry permits established under AS 16.43.290 — 16.43.300, the holder of an entry permit who qualified for that entry permit in a priority classification designated under AS 16.43.250(c) may transfer the permit only to the commission. The transfer to the commission shall be made under the buy-back provisions of AS 16.43.310 — 16.43.320.

(d) *[Repealed, § 9 ch 73 SLA 1977.]*

(e) Before the determination, under AS 16.43.290 and 16.43.300, of the optimum number of entry permits for a fishery, the holder of an entry permit who qualified for that entry permit in a priority classification designated under AS 16.43.250(c) may not transfer that permit unless the commission estimates that the optimum number for that fishery will be equal to or greater than the number of outstanding entry permits and interim-use permits. (§ 1 ch 79 SLA 1973; am § 1 ch 126 SLA 1974; am §§ 3, 4, 9 ch 73 SLA 1977; am § 7 ch 83 SLA 1978; am § 13 ch 72 SLA 1979; am § 2 ch 51 SLA 1980; am §§ 3, 4 ch 47 SLA 1981)

Sec. 16.43.250. Standards for initial issue of entry permits. (a) Following the establishment of the maximum number of units of gear for a particular fishery under AS 16.43.240, the commission shall adopt regulations establishing qualifications for ranking applicants for entry permits according to the degree of hardship which they would suffer by exclusion from the fishery. The regulations shall define priority classifications of similarly situated applicants based upon a reasonable balance of the following hardship standards:

(1) degree of economic dependence upon the fishery, including but not limited to percentage of income derived from the fishery, reliance on alternative occupations, availability of alternative occupations, investment in vessels and gear;

(2) extent of past participation in the fishery, including but not limited to the number of years participation in the fishery, and the consistency of participation during each year.

(b) The commission shall designate in the regulations those priority classifications of applicants who would suffer significant economic hardship by exclusion from the fishery.

(c) The commission shall designate in the regulations those priority classifications of applicants who would suffer only minor economic hardship by exclusion from the fishery.

Alaska Criminal Rule 35. . . .

(c) **Post Conviction Procedure—Scope.** Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of Alaska;

(2) that the court was without jurisdiction to impose sentence;

(3) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) that his sentence has expired, his probation, parole or conditional release have been unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; or

(7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards;

may institute a proceeding under this rule to secure relief.

No. 83-592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LORI L. OSTROSKY, JULIANNE OSTROSKY, and HAROLD C. OSTROSKY,

Appellants

vs.

STATE OF ALASKA,

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

REPLY TO BRIEF OF AMICUS CURIAE AND MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Does the State of Alaska's establishment in certain families of perpetual and exclusive commercial fishing rights to publicly owned salmon violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES: *Page*

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COMMENTS ON THE BRIEF AMICUS CURIAE

The United States is not a disinterested party in this case. The opinion of Amicus Curiae reflects its desire to protect its own programs which are infected. The Government is concerned with the continued viability of certain aspects of the Magnuson Fisheries Conservation and Management Act, 16 U.S.C., 1801 *et seq.* The Government concedes that its interest is that "there is no constitutional obstacle to implementing the federal law through programs that include the same features as the Alaska scheme in suit." Brief Amicus Curiae, p. 6. Indeed, the Government discloses that the North Pacific Fisheries Management Council created pursuant to the Magnuson Act has already limited commercial salmon fishing in certain fishery conservation zones to those who either hold a valid State of Alaska Limited Entry Permit or who previously operated a fishing vessel in the area, stating that, "the validity of this plan is thus dependent upon the constitutionality of Alaska's scheme." Brief Amicus Curiae, p. 7-8.[1] The significance of Alaska's peculiar creation of gratuitous property rights in a publicly owned resource in favor of those temporally fortuitous is that this Court's endorsement thereof will insure its imitation.[2]

The Government concedes that "[A]ppellants are precluded from commercial fishing for salmon from their own boat in

---

[1] The Mid-Atlantic Regional Council's entry plan in which the permit is linked to vessel ownership apparently operates so as to be functionally the same as "free" transferabilty. The question presented is already of national scope and effect, contrary to the assertion of Amicus Curiae in footnote 8.

[2] Amicus Curiae argues that "Alaska's particular permit system is not a prevalent model." Brief Amicus Curiae, p. 12. Affirmance by this Court or dismissal for want of a substantial federal question will cause the Alaska system to become the national model. It's contagious quality has been demonstrated by Amicus Curiae.

Bristol Bay unless they purchase or inherit a permit or receive one as a gift." Brief Amicus Curiae, p. 4.[3]

This case does not end with a discussion of fishing policies however. Fish are a naturally occurring publicly owned resource. Oil, natural gas, and timber are other publicly owned naturally occurring resources, both renewable and non-renewable. If Alaska is able to give away its publicly owned salmon to those and their heirs who fortuitously were commercial users at the right time, then the Washington Legislature can give away its publicly owned timber in perpetuity to those concerns which presently control it; Texas, its publicly owned oil; and Louisiana, its publicly owned natural gas. A feudal system of public resource ownership will be created in this country with access gained only by birthright.

Amicus Curiae argues that a non-permit holder may nonetheless still work as a deck hand on a vessel controlled by a permit holder. So will a non-owner of Texas oil be able to rough neck on a drilling rig and a non-owner of Washington timber be able to buck logs. The only hope all will have of rising above their caste is if they are able to amass enough money and find a willing seller to buy their way into the privileges inherited by those families who have been bestowed with the State's publicly owned bounty.

Amicus Curiae maintains that such resource allocation decisions both by the State and Federal governments are the type of decisions that must be subject to the "least intrusive" standards of judicial review. Brief Amicus Curiae, p. 9. Appellants have suggested that the rational relationship test is not appropriate to this Court's historical interest in the protection of the *opportunity* to fish. *Idaho Ex Rel Evans v. Oregon, infra.* However, even applying the rational relationship test, it is impossible to conceive of any legitimate conservation justification in giving a public resource to a fortuitous

---

[3] Amicus Curiae asserts in n. 8 that "[T]he scheme is not even prevalent in Alaska." Salmon is the most valuable fishery in Alaska. For a century Bristol Bay has produced the most bounteous commercial salmon runs in the world.

few in perpetuity, particularly when one of the purported purposes thereof is to avoid "unjust discrimination." The Government acknowledges that "the State created free market system [assures] that both fishermen and their *families will be taken care of* in case of death or disability. Brief Amicus Curiae, p. 12. It is not explained how choosing certain families for the bestowing of an interest in a publicly owned resource so that they *"will be taken care of"* to the exclusion of all others who have an equal interest in the resource is a constitutionally justifiable phenomenon. The only case that is discussed in support of this peculiar proposition is *Kotch v. Board of River Port Pilot Commissioners for the Port of New Orleans,* et al., 330 U.S. 552 (1947), wherein this Court upheld a program by which state river and harbor vessel pilots were required to participate in a six-month apprenticeship and those selected as apprentices were only relatives and friends of the incumbents. The case did not deal with the giving away of an extremely valuable publicly owned naturally occurring resource to certain pilots and their families in perpetuity. Indeed, the Court specifically noted, "And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers". 330 U.S. at 557. The Court concluded, "Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage." 330 U.S. at 561, noting that "[T]he number of people, as a practical matter, who can be pilots is very limited." 332 U.S. 563.[4]

> Significantly, Justice Rutledge noted in his dissent:
>
> The result of the decision therefore is to approve as constitutional state regulations which makes admission to the ranks of pilots turn finally on consanguinity.

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[4] The majority also stated: "Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation." 330 U.S. 562.

> Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guaranty against denial of the equal protection of the laws. The door is thereby closed to all not having blood relationship to presently licensed pilots. Whether the occupation is considered as having the status of "public officer" or of highly regulated private employment, it is beyond legislative power to make entrance to it turn upon such a criterion. The Amendment makes no exception from its prohibitions against state action on account of the fact that public rather than private employment is affected by the forbidden discriminations. That fact simply makes violation all the more clear where those discriminations are shown to exist.

330 U.S. at 565.

The only other case even cited in support of the Government's premise that it is legitimate for a state to select certain families to be taken care of with a publicly owned resource is *Williamson v. Lee Optical*, 348 U.S. 483 (1955), wherein this Court upheld the provisions of an Oklahoma statute making it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses or to duplicate or replace lenses or other optical appliances except upon prescriptive authority of a licensed ophthalmologist or optometrist. The applicability of this case to the facts at bar is unclear.

COMMENTS ON THE MOTION TO DISMISS OR AFFIRM

Packaging is sometimes more important than the merits of a product for marketability. The State repeatedly asserts to the effect that:

> The Ostroskys are not correct, however, in asserting that the State has violated the Constitution by making entry permits freely transferable.

Motion to Dismiss or Affirm, p. 20. If ever there was an ironic misnomer, it is referring to Alaska's limited entry permits as being "freely transferable." A permit is free only when it is

inherited. It is not free to those not the beneficiaries of a bequest or who do not have the money to buy a permit.

Appellant Harold C. Ostrosky may at one time have qualified for a permit. He chose not to participate in a system that he believed to be unconstitutional.[5] He chose to contest a system that vested the right to a traditionally publicly owned resource in the hands of an exclusive few in perpetuity. Appellants Lori and Julianne Ostrosky unquestionably never qualified for a Limited Entry Permit.

The State asserts that the rational justifications for the Limited Entry Act are essentially three-fold: to prevent economic distress to those dependent upon commercial fishing; to conserve the fisheries; and to avoid unjust discrimination in the allocation of limited entry permits. The State asserts, "making permits freely transferable also furthers the purpose of avoiding unjust discrimination in the allocation of the permits because all persons have an equal opportunity to purchase or receive permits from those who have them." Motion to Dismiss or Affirm, p. 37. The only persons who have an equal opportunity to purchase are those with a great deal of money.[6] The only persons who have an opportunity to receive permits are those who belong to the right families. The State argues that "free" transferability prevents a closed class of persons from holding the permits. Motion to Dismiss or Affirm, at p. 38. The only persons who have access to the property of the class of persons holding the permits are those with money or those that belong to the families of the owner. "Free" transferability is definitionally unjust discrimination by its creation of a closed class of persons to the exclusion of all others from even the *opportunity* for access to a publicly owned

---

[5] The record below is silent on this issue save for Appendix "A" to the State's Motion to Dismiss or Affirm.

[6] It has been reported that a recent sale of a Limited Entry Permit in the Chignik Lagoon area on the Alaska Peninsula was for $375,000. State records of these sales are confidential.

resource. [7] The existence of loan programs for Permits only underlines the disparate treatment. Loan programs must be funded, loans qualified for, and loans paid back with interest. The original issuees and their heirs do not have to borrow or pay back. The loan program also has a two-year durational residency requirement which in itself violates the Fourteenth Amendment. *Zobel v. Williams*, 475 U.S. 55 (1982).

"Prevention of economic distress to those dependent upon commercial fishing" translates to mean protection of only those families who were fishing at the time of the implementation of the Act. It is not necessary to discriminate against subsequent arrivals who do not belong to the right families or who do not have adequate money in order to conserve fisheries. "Free" transferability has no relationship to conservation. Appellants are not asserting that the State does not have the power to limit access to fisheries for conservation purposes. Appellants are asserting that any such limitation of access must be done on a democratic basis consistent with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The State asserts, notwithstanding that Appellants cannot fish commercially, Appellants retain the separate but equal right to fish for subsistence or sport or work as a deck hand on the vessel of a Permit holder. A law clerk who is forever relegated to that status with no opportunity to obtain a license to practice law unless he accumulates sufficient money to buy in and finds a willing seller is not separate but equal to another law clerk who will simply inherit a license to practice law.[8]

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[7] The State suggests that "only" salmon and herring fisheries are affected. These are the most valuable fisheries in Alaska.

[8] The State suggests that another justification for Limited Entry is that if the owner of a Permit has an economic stake, the fisherman will be more likely to conserve. There is no evidence for this either in logic or the record. Indeed, such a financial investment may only encourage exploitation in order to maximize profit to pay for a Permit. It is not necessary for an attorney to have purchased a bar certificate for $100,000 in order to show respect for the courts.

While directly at issue is the "free" transferability provision of the Limited Entry Act, the entire Limited Entry Act is inseparable from the transferability provisions. The original issuing criteria are inextricably intertwined with transferability. The fact that it is the original issuing persons whose families retain the permits by operation of law unless they decide to sell necessarily brings into question the method and manner of the original issuance.

This Court has long recognized that the *opportunity* to fish is an interest of sufficient dignity and importance to warrant certain protections. In the prologue to the three-justice dissent in *Idaho Ex Rel Evans v. Oregon*, _____ U.S._____ (No. 67. ORIG. 6-23-83), Justice O'Connor noted:

> The Master properly concluded that "Idaho is entitled to its fair share of the fish." Id., at 25. No one owns an individual fish until he reduces that fish to possession, Pierson v. Post, 2 Am. Dec. 264 (N.Y. 1805), and indeed, even the States do not have full-fledged "property" interests in the wildlife within their boundaries, see, e.g., Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284, 97 S. Ct., 1740, 1751, 52 L.Ed. 2d 304 (1977); Missouri v. Holland, 252 U.S. 416, 434, 40 S. Ct. 382, 384, 64 L.Ed. 641 (1929). Nonetheless, courts have long recognized the *opportunity* to fish as an interest of sufficient dignity and importance to warrant certain protections. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558 (CA9 1974); Louisiana ex rel. Guste v. M/V Testbank, 524 F.Supp. 1170 (E.D. La. 1981); Weld v. Hornby, 7 East 195 (K.B. 1806); J. Gould, Law of Waters §§ 186, 187 (1883); 3 J. Kent, Commentaries 411 (5th ed. 1844); cf. New Jersey v. New York, 283 U.S. 336, 345, 51 S. Ct. 478, 480, 75 L.Ed. 1104 (1931) (considering the effect on oyster beds in apportioning water); Douglas, supra at 267-268, 97 S.Ct., at 1742-1743 (REHNQUIST, J., concurring in part and dissenting in part) (although State has no ownership in wildlife in the conventional sense, it has a "substantial proprietary interest"). See generally United States

> v. Washington, 520 F.2d 676 (CA9 1975), cert. denied, 424 U.S. 978, 96 S. Ct. 1487, 47 L.Ed.2d 750 (1976). Indeed, in recent years, as the runs of anadromous fish have diminished and no longer satisfy fully the demands of all fishermen, the federal courts frequently find themselves confronted with disputes over the management and conservation of the resource. Faced with these problems, the courts, including this Court, have not hesitated to recognize that various claimants do possess protectible rights in the runs of fish, whether or not those claimants ultimately manage to land and reduce particular specimens to possession and full ownership. See, e.g., Washington Game Department v. Puyallup Tribe, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973); Sohappy v. Smith, 529 F.2d 570 (CA9 1976) (per curiam); United States v. Washington, supra; Sohappy v. Smith, 302 F.Supp. 899 (Or. 1969).

(Emphasis in original).

There have been several decisions of the Supreme Court of the State of Alaska relating to Limited Entry since the *Ostrosky* decision now before this Court. In *Timperley v. Jeffries*, Opinon No. 2765, Dec. 16, 1983, the Alaska Supreme Court held that when a limited entry permit passes through an estate to an heir it cannot be attached by creditors. The Court specifically found that it was "not persuaded" that allowing transfer for a single heir free of creditor's claims denies equal protection either to multiple heirs of a deceased permit holder or to estates not in possession of limited entry permits. Footnote 4 of the Opinion notes that the Court had rejected "similar constitutional objections to the limited entry act transferability provisions" in *State v. Ostrosky*. Alaska has given away a valuable public resource of fish to a selected few and their lineal descendants free from even creditor's claims.

In *Commercial Fisheries Entry Commission, State of Alaska v. Apokedak*, Opinion No. 2794, March 2, 1984, Justice Dimond dissenting, the Alaska Supreme Court held that the actual legal partner of a gear license holder fishing as of the cutoff date did not qualify for a Limited Entry Permit. The

Court found that exclusion of this partner was not "unjust discrimination."

In *David E. Nash v. State of Alaska*, Opinion No. 2802, March 23, 1984, the Alaska Supreme Court restated that in order to be eligible for the original issuance of a Limited Entry Permit the applicant must have been a past participant in the fishery *and* held a gear license.

Finally, in *Wik v. Ruyder*, Opinion No. 2822, April 10, 1984, the Alaska Supreme Court held that Limited Entry Permits are to be treated as ordinary personal property for inheritance purposes.

CONCLUSION

Comparisons have been attempted with Alaska's Limited Entry. It has been suggested that the Homestead Act wherein public lands were given away might be comparable. This comparison is not apt as all persons had equal access to public land if they were willing to go out and homestead. Here, the only persons who were given access to the permits were those who were already fishing. Fish are also a renewable natural resource, not a finite one such as land in which private ownership is a basic premise of the country.

Alaska Limited Entry is also distinguishable from oil leases as such leases are sold for value and the public at large gains benefit from the income derived thereby. Anyone can bid on an oil lease. It is necessary to sell such a public asset as the costs of development are high and it would be impractical to allow the public at large general access to a pool of oil underground. Oil is also not renewable.

Alaska Limited Entry is distinguishable from government timber sales. Timber is sold for value and the public at large realizes a benefit thereby. Timber is not given away to a lucky few and their heirs in perpetuity to the exclusion of others with an equal interest. It is necessary to sell timber as it is impractical to allow individuals commercial access. Significant investment is needed to be able to process timber. This is in stark contrast with fishing. Indeed, in the Bristol Bay salmon fishery

boats are limited to a maximum length of 32 feet. 5 AAC 06.341.

A comparison to a public utility franchise is not appropriate. A public utility is a necessary monopoly occasioned by the scope and circumstances of its operations. In such instances it has been determined that it is impossible to provide services without a protected and regulated monopoly. This is not true of commercial fishing in small boats. Even if it is necessary to limit the number of boats fishing it does not follow that it is necessary to give the right to fish only to certain families in perpetuity.

Limited Entry is not the first attempt by a State to monopolize a public resource into the hands of a privileged few. This Court's explicit or tacit approval thereof would insure that it will not be the last. The question presented raises substantial issues of admittedly national scope that require plenary consideration by this Court.

DATED this 4th day of May, 1984, at Anchorage, Alaska.

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No. 83-592

In the Supreme Court of the United States

OCTOBER TERM, 1983

LORI L. OSTROSKY, ET AL., APPELLANTS

v.

STATE OF ALASKA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Alaska's Limited Entry Act, Alaska Stat. §§ 16.43.010 *et seq.* (1983), which limits access to commercial salmon fishing to holders of heritable and transferable permits, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Page

Constitutions, statutes and regulations—Continued:

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Appellants were convicted in the Superior Court of the State of Alaska, Third Judicial District, on one count of commercial fishing for salmon in Bristol Bay without a permit and one count of illegal possession of commercially caught fish, both in violation of Alaska's Limited Entry Act, Alaska Stat. § 16.43.360 (1977). Harold Ostrosky was fined $10,000 with $9,000 of that amount suspended; the other two appellants, his daughters, were each fined $5,000 with $4,500 suspended. Appellants' boat was ordered forfeited to the State, but forfeiture was suspended for two years. J.S. App. 3a. After sentence, the superior court granted appellants' motion to vacate their convictions (J.S. App. 4a n.3). The Alaska Court of Appeals certified the case to the Alaska Supreme Court, which reversed (J.S. App. 1a-26a).

1. The Alaska Legislature adopted the Limited Entry Act (the Act), Alaska Stat. §§ 16.43.010 *et seq.* (1983), in 1973, because it concluded that both the economic efficiency of the fisheries as well as sustained yield fishery management were seriously threatened by the levels of participation in commercial fishing in certain State-controlled fisheries. Alaska Stat. § 16.43.010(b) (1983). The express purposes of the statute therefore were conservation of the State's fishery resources and promotion of "the economic health and stability of commercial fishing" by "controlling entry into the commercial fisheries in the public interest and without unjust discrimination." Alaska Stat. § 16.43.010(a) (1983); see also *Commercial Fisheries Entry Commission* v. *Apokedak*, 606 P.2d 1255 (Alaska 1980).

In order to limit the number of commercial fishermen in threatened fisheries, the Act established a Commercial Fisheries Entry Commission which was empowered to issue a finite number of permits authorizing commercial exploitation of these fisheries. Alaska Stat. §§ 16.43.020, 16.43.140 (1983). The Commission has imposed a limit only on access to fisheries of salmon and herring within the State. All other fishing in Alaska is open to all commercial fishermen. Alaska Admin. Code tit. 20, §§ 05.300, 05.310 (July 1983). In addition, the access limitations apply only to commercial fishing; recreational and subsistence fishing are still available by permit to all fishermen. Alaska Stat. §§ 16.05.330, 16.05.930 (1983). Finally, only one person on a fishing vessel needs to have a permit. Any individual can be a commercial fisherman so long as someone who has a permit is on the boat with him.

The initial selection of permittees was based on several criteria, but of primary importance was the degree to which an applicant was dependent upon commercial fishing in the threatened fishery for a livelihood. Alaska Stat. § 16.43.250(a)(1) (1983); Alaska Admin. Code tit. 20, §§ 05.600 *et seq.* (July 1983). Generally, this meant that

part-time fishermen were to be excluded from the commercial fisheries in order to enhance the economic opportunities of those for whom a given fishery was the primary source of income.

The entry permit received by the applicant is valid for one year, but is renewable annually upon the payment of a fee. Alaska Stat. § 16.43.150(c) (1983). The fee charged for permits ranges from less than $10 to $750, depending on the expected rate of economic return for the particular fishery. Alaska Stat. § 16.43.160 (1983). The Commission is also authorized to modify the number of outstanding permits; it may issue new permits or buy back existing ones in order to maintain "the optimum number of entry permits for each fishery." Alaska Stat. § 16.43.290 (1983); *id.* §§ 16.43.300-16.43.330. The "optimum number" of permits is to be decided on the basis of a "reasonable balance" of three factors—providing fishermen with a reasonable rate of return on their investment, assuring that the fish harvest is conducted in an orderly and efficient manner and protecting fishermen from serious economic hardship. Alaska Stat. § 16.43.290 (1983). Since the issuance of the initial permits, the Commercial Fisheries Entry Commission has not, however, found any change in circumstances that has required it to act upon new applications from fishermen seeking to enter any of the fisheries that have been included in the limited entry program.[1]

The Limited Entry Act provides that the permits are transferable by sale, gift, devise or intestate succession. Alaska Stat. §§ 16.43.170(b), 16.43.150(h) (1983). Reportedly, large numbers of permits have been transferred

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[1]Some fishermen's applications were accepted after the Alaska Supreme Court struck down on equal protection grounds an eligibility provision that required applicants to have fished commercially during 1973 in order to obtain a permit. *Isakson* v. *Rickey*, 550 P.2d 359 (Alaska 1976).

pursuant to these provisions at a fluctuating market price reflecting the relative abundance of commercially exploitable fish in the various regions (J.S. App. 14a & n.8). Thus, although the Commercial Fisheries Entry Commission is authorized to regulate the renewal and transfer of permits,[2] possession of a valid permit at least for the foreseeable future carries with it many incidents of private ownership of personal property.

2. In 1979, appellants were convicted of fishing commercially for and unlawfully possessing salmon in the Bristol Bay of Alaska, which is the richest salmon fishing area in the State (J.S. App. 3a). Bristol Bay is a limited access fishery and therefore commercial fishing is permissible only by those who hold a valid permit. Although appellant Harold Ostrosky was apparently eligible for such a permit when they were initially issued, he did not apply for one (Mot. to Dis. or Aff. App. A). Since no new permits have been or are being issued, appellants are precluded from commercial fishing for salmon from their own boat in Bristol Bay unless they purchase or inherit a permit or receive one as a gift. Appellants thus challenged their convictions in post-trial motions as violative of several provisions of both the state and federal constitutions.

The superior court granted the motion. Relying solely upon the Alaska Constitution, the court held that the market allocation system for previously issued permits did "not bear a fair and substantial relation to the statutory purposes of protecting the fishermen's investment and preventing fishermen from economic distress" (J.S. App. 7a n.3). The court also held "that the inheritance and transferability provisions of the Act have the effect of causing,

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[2]Transferees must establish their ability to participate in the fishery before the Commission can approve the transfer and reissue the permit to the transferee. Alaska Stat. § 16.43.170(b) (1983).

rather than avoiding, unjust discrimination, among those seeking permits" in violation of the State's equal protection clause (*ibid.*). Since the permit system was invalid, the court concluded that it would be unfair to penalize appellants criminally for failing to possess a permit (*ibid.*).

The Alaska Supreme Court reversed (J.S. App. 1a-26a). First, it rejected appellants' challenge to the validity of the initial entry restrictions. The court found that the restriction was consistent with the State's constitutional provision that reserves to the people of the State access to fish and wildlife, Alaska Const. Art. VIII, § 3, and the provision that guarantees all individuals equal protection under the law, Alaska Const. Art. I, § 1 (J.S. App. 6a-11a).[3]

Second, the court held that the transferability provision of the limited entry program did not violate either the State or the United States Constitution. With regard to the equal protection claim, the court noted that the standard is somewhat different in the two constitutions. Nevertheless, applying both provisions, the court found that appellants' asserted interest in engaging in commercial fishing is "not of a high order" and, therefore, that the State statute need only satisfy a rational basis test in order to withstand scrutiny under either equal protection provision (J.S. App. 17a, 19a).

The court found that unrestricted transferability of permits was intended to serve four basic objectives, viz., "(1) enhancing the economic benefit to fishermen; (2) conserving the fishery; (3) avoiding unjust discrimination in the allocation of a limited number of entry permits; and (4)

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[3]The Alaska Supreme Court also rejected appellants' claim that the entry restrictions violated the Commerce Clause of the United States Constitution (J.S. App. 12a n.6). There is no indication that appellants challenged the entry restrictions as being in violation of the Equal Protection Clause of the Fourteenth Amendment.

administrative convenience" (J.S. App. 20a). The court then concluded that these objectives are "legitimate" and "they are fairly and substantially furthered by free transferability" (*id.* at 21a). The court thus held that "the state constitution is not violated [and] * * * [t]he same analysis is applicable, and yields the same conclusion as to federal equal protection" (*ibid.*).[4]

DISCUSSION

The challenge mounted against Alaska's Limited Entry Act implicates similar allocation systems adopted for fisheries within the federal government's jurisdiction under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* Congress enacted that statute for reasons similar to those that motivated the State Legislature to adopt its statute, and, in our view, there is no constitutional obstacle to implementing the federal law through programs that include the same features as the Alaska scheme in suit. Accordingly, we believe the Alaska Supreme Court was clearly correct in rejecting appellants' attack and urge affirmance of that decision or dismissal of the appeal for want of a substantial federal question.

1. In 1976, Congress adopted the Magnuson Fishery Conservation and Management Act, which like Alaska's Limited Entry Act is designed to conserve fishery resources, provide an optimum yield of fish in all fisheries within the United States' jurisdiction and to promote domestic commercial fishing. 16 U.S.C. 1801(b). To fulfill these purposes nationwide, Congress created eight Regional Fishing Management Councils (Regional Councils), which are required to prepare and submit to the Secretary of Commerce "a fishery management plan with respect to each fishery within

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[4]Justice Rabinowitz dissented, but only on the basis that the transferability provisions violated the State constitution (J.S. App. 21a-26a).

its geographical area of authority." 16 U.S.C. 1852(h)(1). Congress delegated to the Regional Councils and the Secretary the authority to "establish a system for limiting access to the fishery in order to achieve optimum yield," so long as the Regional Council or Secretary takes into account, inter alia, existing participation in a fishery, traditional fishing practices at the fishery and the capability of present users to use other fisheries. 16 U.S.C. 1853(b)(6).

The regulations implementing the National Guidelines for Fishery Management Plans recognize that there are a variety of systems available to allocate access to fisheries, and the choice of any particular system must depend upon circumstances unique to a particular area and fishery. 50 C.F.R. 602.14. As the appendix to the regulations explains (50 C.F.R. Pt. 602, Subpt. B App. A at 431):

> *Direct* allocations * * * have been made by the several Councils in a variety of [Fishery Management Plans] in the past: Quotas by classes of vessels (Atlantic groundfish), quotas for commercial and recreational fishermen (Atlantic mackerel), different fishing seasons for recreational and commercial fishermen (salmon), assignment of ocean areas to different gears (stone crab), and limiting permits to present users (surf clam).

Although the Regional Councils, like the State of Alaska, ordinarily prefer not to impose fixed restrictions on commercial fishermen's access to a particular fishery, they have done so when they have found it necessary to conserve a particular fishery. Thus, for instance, the North Pacific Fishery Management Council has limited commercial salmon fishing in the fishery conservation zone located to the east of Cape Suckling to operators who on May 15, 1979, held a valid State of Alaska permit issued pursuant to the State's Limited Entry Act or who had actually operated a fishing vessel in the management area and landed salmon during the calendar years 1975, 1976 or 1977. 50 C.F.R.

674.4(a) and (b). The validity of this plan is thus dependent on the constitutionality of Alaska's scheme.[5]

Similarly, the Mid-Atlantic Regional Council adopted a limited entry plan for its surf clam fisheries in the Mid-Atlantic Region. A permit to fish is required and a vessel is eligible for a permit only if it was actually used for fishing, was being constructed or was replaced by a vessel that was actually used for fishing in November 1977. 50 C.F.R. 652.4(b)(i), (ii) and (iii). No new vessels are eligible. Although the permit expires when the vessel changes ownership, the new owner will receive a new permit for the vessel if he requests one. 50 C.F.R. 652.4(h)(2). The permits therefore are in effect transferable and inheritable; they run with the vessel which is itself freely transferable. Thus, the Mid-Atlantic Regional Council's plan has substantial elements in common with Alaska's limited entry system.

2. To our knowledge no one has challenged, on equal protection grounds, any of the Regional Councils allocation systems, including the North Pacific's salmon plan or the Mid-Atlantic Regional Council's surf clam program; nor would such a challenge be successful. The resource allocation decisions that the federal government, and the State of Alaska, must make with regard to those fisheries

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[5]Alaska's conservation plan for Bristol Bay also affects another portion of the High Seas Salmon Fishing Management Plan, which was adopted pursuant to the Magnuson Fishery Conservation and Management Act, (see 50 C.F.R. 674.1 *et seq.*). The Salmon Plan prohibits all commercial salmon fishing in federal waters *west* of Cape Suckling — *i.e.*, it prohibits commercial net or troll fishing outside Alaska's three-mile territorial sea in Bristol Bay where appellants were arrested. The reason the management plan prohibits commercial salmon fishing is that Alaska allows the use of nets within state waters by fishermen holding Limited Entry Permits. The North Pacific Fishery Management Council concluded that all salmon available in commercial quantity would be taken within three miles of Alaska, and that therefore none would be available in the federal Fishery Conservation Zone.

that are endangered by overuse are the type of decisions that must be subject to the least instrusive standard of judicial review under the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.

It is not clear precisely what appellants challenge. At one point in their Jurisdictional Statement they seem to attack the very idea of limited entry with regard to a "public" resource such as fish (J.S. 8); at times, they appear to challenge the original criteria for selecting permittees (J.S. 9-11); but the thrust of their challenge is clearly aimed at the free market allocation system Alaska has adopted (J.S. 7-13). The first two contentions directly implicate many of the Regional Council plans, which for reasons stated below we believe are plainly constitutional. Initially, we note, however, that these broader challenges seem not to have been presented to the Alaska Supreme Court and therefore are not properly before this Court.[6]

In any event, since all three challenges are based on the Equal Protection Clause of the Fourteenth Amendment, the basic inquiry is the same. It is well settled that this Court employs a tiered approach to analyzing equal protection challenges to statutes. At one extreme, if the statute discriminates against a suspect class of individuals or interferes with the exercise of a fundamental right, the Court presumes the statute is unconstitutional and applies a "strict scrutiny" standard of review, which requires the State to

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[6]It is at least questionable whether appellant Harold Ostrosky has standing to challenge the legality of the initial criteria since he arguably would have received a permit under those standards if he had applied for one.

We note that the constitutionality of the selection criteria was raised in a previous state court proceeding by different litigants, and the Alaska Supreme Court found the initial criteria to be constitutional. *Commercial Fisheries Entry Commission* v. *Apokedak*, 606 P.2d 1255 (Alaska 1980). To our knowledge, no one has since challenged them.

show that its classification is necessary to fulfill a compelling governmental interest. See, *e.g., Brown* v. *Board of Education,* 347 U.S. 483 (1954). At the other extreme, if an economic regulation is challenged, the inquiry is based on a rational relationship test: whether the statutory classification rationally furthers a legitimate state objective. See, *e.g., San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *Dandridge* v. *Williams,* 397 U.S. 471 (1970). In the middle tier cases, such as those involving gender-based classifications, the State is required to show that the classification is substantially related to the achievement of important governmental objectives. See, *e.g., Califano* v. *Webster,* 430 U.S. 313 (1977); *Craig* v. *Boren,* 429 U.S. 190 (1976).

The Alaska Supreme Court correctly concluded that appellants' interest in being able to engage in commercial fishing is not a fundamental right or an interest that triggers judicial scrutiny more intrusive than the "rational relationship" test ordinarily applied to any classifications based on the government's regulation of economic interests. See, *e.g., Zobel* v. *Williams,* 457 U.S. 55, 61 (1982); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976). Indeed, appellants concede (J.S. 8-9) that the State has the "power to preserve and regulate the exploitation of an important resource," such as fish. *Toomer* v. *Witsell,* 334 U.S. 385, 402 (1948) (footnote omitted). See *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977); *Takahashi* v. *Fish & Game Comm'n,* 334 U.S. 410, 420-421 (1948). The State's interest in regulating fishermen is certainly no less than it has in licensing hot dog vendors, *City of New Orleans* v. *Dukes, supra,* river boat pilots, *Kotch* v. *Board of River Port Pilots Commissioners,* 330 U.S. 552 (1947), or opticians, *Williamson* v. *Lee Optical, Inc.,* 348 U.S. 483, 487-488 (1955). And, on the other hand, appellants' interest in commercial fishing is no more fundamental than the interests asserted in those cases. There is therefore no reason not

to judge the present commercial activity by the same lenient standard.

Nor is a different result required because entry is limited by a permit that can be transferred or devised. In *Kotch* v. *Board of River Port Pilots Commissioners*, 330 U.S. at 555 (citation omitted), the Court noted that the limited entry system there was " 'closed . . . to all except those having the favor of the pilots,' " yet the Court still analyzed the State's scheme under a rational relationship approach. If anything, Alaska's scheme is significantly more open than was Louisiana's at issue in *Kotch*. In *Kotch*, access to a river boat pilot's license was restricted to family and close friends of pilots who held a license. By contrast, there is a brisk market for permits under Alaska's system and therefore entry is available for fishermen such as appellants, albeit at a price. The State, however, has significantly eased the financial burden on entrants by providing loans at reasonable interest rates to those who are capable of engaging in commercial fishing for salmon. Alaska Stat. § 16.10.320 (1983). Accordingly, the State's permit scheme involves no more than the regulation of a simple economic activity, and should be upheld if the scheme rationally furthers a legitimate State interest.[7]

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[7]Appellants' argue that Alaska's limited entry system, by providing protection for a permit holder's family discriminates "as to status by birth" (J.S. 13), because individuals born to a parent who has no permit will lack access to commercial salmon fishing. But cases cited by appellants (J.S. 12-13) involving disabilities imposed by governments on the basis of illegitimacy, such as *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), are not comparable to this case. The child born to a parent who does not hold a permit is not forever barred from acquiring a permit. Indeed, the child is not barred from being a salmon fisherman; he only needs to find employment on a boat operated by a permittee. Moreover, a child of a permit holder is not guaranteed that he will be able to fish for salmon commercially; the permittee is free to sell or give the permit away or devise it to someone other than a relative. Thus, the statute in no way creates a family based set of distinctions that might require a

Appellants do not even argue that the State's statutory interests are not legitimate or furthered by the permit system it has created. There is no question that the need to conserve the State's fisheries is a legitimate interest of the State. Thus, at least some limited access scheme is plainly warranted. The choice of a free market system eliminates the tremendous burden and expense that an administratively operated permit system would impose upon the State. See, *e.g.*, *Schweiker* v. *Wilson*, 450 U.S. 221, 238-239 (1981). Moreover, the State has legitimately adopted a limited access scheme designed to protect the welfare of those who are and have been dependent on salmon fishing for their livelihood. The market value of the permit under the State-created free market system assures that both fishermen and their families will be taken care of in case of death or disability. This security will also assure that the fishing industry, which is of vital importance to the State's economy, remains strong. These justifications are more than sufficient. There is no doubt that the State's scheme satisfies the rational relationship test.

3. In our view, the question of the constitutionality of Alaska's permit system does not warrant plenary consideration by this Court. The decision below does not conflict with any decision of any other court, and, although not unique, Alaska's particular permit system is not a prevalent model.[8] But, more important, we believe the judgment of

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stricter level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Compare *Califano* v. *Jobst*, 434 U.S. 47 (1977).

[8]The scheme is not even prevalent in Alaska. Nor is it likely that the Regional Councils outside of the North Pacific Region would adopt a plan exactly like Alaska's. All of the existing plans from other regions involve issuing the permit to a vessel and it seems likely that that practice will continue.

the Alaska Supreme Court is so plainly correct in rejecting the federal constitutional claim as to justify summary disposition of this appeal.

CONCLUSION

This judgment should be affirmed or the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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